87-1408

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

FRANK V. AIELLO,
Petitioner,

VS.

CALVIN MARTIN and STANLEY LEWIS,
Respondents.

PETITION FOR CERTIORARI—TORT CLAIM

FRANK V. AIELLO
Attorney at Law
P.O. Box 337
Mt. Shasta, CA 96067
Tel.: (916) 926-3125
Petitioner Pro Se

QUESTIONS PRESENTED FOR REVIEW

Did the Court of Appeal err in holding that this Court's ruling in Whiteside v. Nix, 89 L. Ed 2d 123, 106 S Ct 988 (1986) is limited to criminal habeus corpus cases, or otherwise limited by the common law principles of immunity generally afforded parties and witnesses from subsequent damage liability for their testimony in judicial proceedings ?

Did the Court of Appeal err in holdling an attorney and his client absolutely immune from liability to third parties for his professional acts committed on behalf of a client in at least reckless disregard of statutory authority ?

TABLE OF CONTENTS

TABLE OF AUTHORITY

Constitutional and Statutory Provisions

CASES

Texts, Legislative Histories, General Authority

Canons and Rules of Professional Conduct

No. _____

_____

IN THE SUPREME COURT OF THE UNITED STATES

_____

October Term, 1987

_____

FRANK V. AIELLO,

Petitioner,

vs.

CALVIN MARTIN and STANLEY LEWIS,

Respondents,

PETITION FOR CERTIORARI- TORT CLAIM

OPINION BELOW

The opinion of the Court of Appeals is unreported (App. A, pp. 1-7).

JURISDICTION

The opinion of the Court below was entered on November 23, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. Section 2101(c).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are as follows:

1. Alaska Statutes (A.S.) 16.43.150 (g) provides as follows:

***

"Terms and conditions of Entry Permit; Annual Renewal...

***

(g) Except as provided in AS 16.10.333-16.1 0.337 and in A.S. 44.181.230-44.81.250 [which allow the State to possess a security interest in a permit to secure a loan made by the State to purchase the permit], an entry permit may not be:

(1) pledged, mortgaged, leased, or encumbered in any way;

(2) transferred with any retained right of repossession or foreclosure; or

(3) attached, distrained, or sold on execution of judgment or under any other process or order of any court...."

2. 20 Alaska Administrative Code, section 05.731 provides, in part, as follows:

Lease, Encumbrance, or Retained Right of Repossession Prohibited. (a) A Request for Permanent transfer of Entry Permit is presumed to be pursuant to a lease, encumbrance, attachment, or retained right of repossession if the proposed transferee's immediate family has, within two years immediatly preceeding

the filing of the Request to Transfer, held and caused to permanently transferred, a permit for the same fishery as that currently requested. The Commission will refuse to approve a Request for Transfer which is pursuant to a lease, encumbrance, attachment, or retained right of repossession.

(1) If the entry permit to be transferred is the identical permit previously transferred by the proposed transferee or member of the proposed transferee's immediate family, unless the presumption is rebutted by clear and convincing evidence. (Emphasis added)

STATEMENT OF THE CASE

The facts necessary to place in their setting, the questions now raised, can be briefly stated as follows:

On or about the beginning of August, 1982, Petitioner agreed to purchase and Paul A. Roller agreed to sell, a certain

Commercial Fisheries Limited Entry Permit no. SO 3H 62149L issued by the State of Alaska Commercial Fisheries Limited Entry Commission. This permit allowed the holder thereof to commercially fish for salmon within a designated area of the Cook Inlet in the State of Alaska. This permit had been transferred to Roller in June, 1982 from an individual 1982 known as Danny L. Martin, the stepson of Respondent Martin. According to the required transfer forms filed with the State of Alaska Commercial Fisheries Entry Commission, the parties executing that document chcked a box designating the transfer was made by "gift or inheritance, no money involved" (See: Petitioner's REPLY MEMORANDUM TO DEFENDANT MARTIN'S OPPOSITION TO PLAINTIFF'S RULE 11 MOTION; see also: the outline of the tansfer process and documents required to be filed to effectuate the transfer of a

limited entry permit set forth in Petitioner's MOTION FOR A STAY OF PROCEEDINGS, OR IN THE ALTERNATIVE, MOTION IN LIMINE FOR AN EVIDENTIARY DETERMINATON AS TO WHETHER LIKE TRANSFERS CAN BE USED TO ESTABLISH A PATTERN AND PRACTICE OF CONDUCT ON THE PART OF DEFENDANT MARTIN AND OTHERS at pp. 4-6.

Pursuant to Petitioner's agreement with Roller, Roller, forwarded to the offices of the State of Alaska Commercial Fisheries Entry Commission, a form Notice of Intent to Permanently Transfer Entry Permit No. SO3H 62149L.

On August 10, 1982, Stanley Lewis, an attorney at law licensed in the State of Alaska and an employee of the law firm of Birch, Horton, Bittner, Pestinger, and Anderson telephoned Larry McKinstrey, an attorney at law and officer for the State of Alaska Commercial Fisheries Entry

Commission on behalf of his client, Respondent Calvin Martin.

Subsequent to that telephone conversation, Officer McKinstry initially prepared a memorandum dated August 19, 1982 directed to the Commissioners of the Limited Entry Commission, and also, on October 12, 1982, an affidavit based on that conversation and stated under oath as follows:

> "Mr. Lewis informed me that his client, a Calvin Martin had consulted him concerning an entry permit which Mr. Martin had sold to a Paul A. Roller in 1982 for $ 100,000. plus 25 % of the income derived from the use of the permit during the 1982 season....".

In his memorandum of August 19, 1982, Mr. McKinstrey stated that the purpose of Respondent Lewis's telephone call on bahalf of Martin was as follows:

> " The thrust of Mr. Lewis's questions was whether or not the Commission could do anything to stop the attempted transfer or notify him of the filing of intent to transfer forms. He stated that it was his intention to file an action aimed at getting a restraining order against the unnamed transferee."

A copy of both the memorandum of August 19, 1982 and the affidavit of October 12, 1982 are attached as Exhibits "A" and "B" respectively to Petitioner's motion in limine above-referred.

On August 24, 1982, Paul Roller

received a certified letter, # P31624119323, sent by Respondent Lewis wherein he stated as follows:

> " Please be advised that this law firm has been retained by Calvin C. Martin to obtain payment of $100,000. for the drift permit transferred to you this summer. In lieu of $100,000., Mr. Martin is seeking retransfer of the drift permit in his name.
>
> Please treat this letter as a formal demand for payment of $100,000. or return of the drift permit in lieu of payment. If $100,000. is not received within ten (10) days following your receipt of this letter, I will not hesitate to publish in the Anchorage Times and obtain a default judgment, In lieu of payment, you may notify my office that you intend to transfer the permit to Calvin Martin." (Emphasis added)

A copy of said letter is attached as Exhibit "C" to Petitioner's OPPOSITION TO DEFENDANT LEWIS'S MOTION TO DISMISS OR TRANSFER.

Subsequent to the receipt of this letter and according to the affidavit of Paul A. Roller attached to said OPPOSITION

TRANSFER, marked Exhibits "D" and "D1" therein, Respondent Lewis personally contacted Mr. Roller although Mr. Roller had retained counsel and so informed Lewis. Mr. Roller also informed the latter that the allegations of sale were completely fabricted, that a complaint based on such allegations would constitute a fraud on the court, and that he would not accept service of process of a spurious suit.

Respondent Lewis thereupon filed a complaint dated August 25, 1982 on behalf of Calvin Martin as plaintiff against Paul A. Roller in the Superior Court for the State of Alaska, Third Judicial District, as Case No. 3AN-82-6724 Civ. A copy of said complaint was attached to said OPPOSITION above referred as Exhibit "E".

In said complaint, Martin alleged that his son, Danny Martin was the owner of Cook Inlet Drift Permit Number SO3H 62149L, that

his son, and Roller entered into an agreement whereby Danny Martin agreed to transfer the subject permit to Roller. As consideration for that transfer, it is alleged that Roller promised to pay for the permit:

> "... in a single installment at the close of the 1982 salmon season. In the event, defendant was unable to make said payment, defendant defendant promised to transfer the drift permit to Calvin C. Martin at the close of the 1982 salmon harvest."

On or about October 17, 1982, Petitioner herein was informed by a copy of the certified letter from the State of Alaska Commercial Fisheries Entry Commission that dated October 14, 1982 and addressed to Paul A. Roller that the Commission refused to approve the request for transfer of the subject entry permit to appellant because of certain proceedings pending against the permit. A cpoy of said letter is attached to Respondent Lewis's MOTION TO DISMISS OR

TRANSFER as Exhibit "C" thereto.

On or about October 13, 1982, Paul A. Roller received a Notice to Show Cause re; revocation of the subject limited entry permit by the Commercial Fisheries Limited Entry Commission. The allegations made by officer McKinstry's in his affidavit of October 12, 1982 formed the statutory basis of the revocation proceedings, which were instituted pursuant to A.S. 16.43.355 et seq. The show cause notice alleged:

> " [That] Paul A. Roller did knowingly supply and/or assist in supplying and/or fail to correct false information provided to the Commission on the Request for Transfer of Entry Permit form dated June 17, 1982;
>
> (1) By claiming that the permit was acquired by gift, or inheritance, (no money involved)" (Emphasis added)

A copy of the Notice to Show Cause dated October 13, 1982 is attached to Petitioner's MOTION FOR AN INQUIRY PURSUANT TO RULE 11 as Exhibit "C".

On November 19, 1982, Petitioner herein received a letter written by Respondent Lewis dated November 15, 1982, which letter states in part:

> " It is our client's position that Paul Roller obtained the permit by means which would prevent him from offering the same to any person." (Emphasis added)

A copy of said letter is attached as Exhibit "F" to Petitoner's OPPOSITION TO DEFENDANT LEWIS'S MOTION TO DISMISS OR TRANSFER.

On December 3, 1982, Petitioner filed suit against Martin and Lewis alleging an interference with Petitioner's contractual relationship with Paul A. Roller in that the sole purpose of Respondent Lewis's telephone contact with the Commercial Fisheries Entry Commission on August 10, 1982, was to prevent the transfer of the subject permit from Roller to Petitioner.

On January 27, 1983, Respondent Lewis,

in a letter to C. Michael Hough, attorney for Roller at the show cause hearing stated that:

> " But for the Commission's preventing your client's transfer of the entry permit, there would be no permit to litigate. It would now be in the hands of a third party BFP, and Paul Roller would have accomplished his obvious goal, the substance of which is alleged in Cal Martin's third cause of action."

A copy of this correspondence is attached as Exhibit "A" to Petitioner's OPPOSITION TO DEFENDANT LEWIS'S MOTION TO DISMISS OR TRANSFER.

On February 23, 1983, the Commercial Fisheries Entry Commission began revocation proceedings relative to the subject limited entry permit. During the course of said hearing, Respondent Martin, in the presence of his attorney, was confronted with the original of the transfer form executed by his son, Danny Martin as transferor and Roller as transferee and admitted that he had completed certain portions of the

document. When asked who filled out the portion of the document designating whether the transfer was a "gift or inheritance (no money involved"), Martin stated under oath that he didn't "recall" filling in that portion, and that he didn't believe he did it. (See Exhibit "D" to Petitioner's REPLY MEMORANDUM TO DEFENDANT MARTIN'S OPPOSITION TO RULE 11 INQUIRY; specifically, see: REPLY MEMORANDUM at pages 3-4 for designated portions of Respondent's sworn testimony.)

On or about May 24, 1984 during the deposition of Paul A. Roller in Martin's state court action against Roller, Respondents Martin and Lewis became aware that a questioned documents examiner, Leonard Schultz, testified at the show cause hearing on February 25, 1983 that the blue ink found on side two of the transfer form was the same blue ink found on side one, which Martin had testified to partially completing, which evidence would tend to establish the fact that Respondent Martin,

not Roller checked the box indicating the permit was transferred to Roller by gift. (See: Exhibit "E" to Petitioner's REPLY MEMORANDUM TO DEFENDANT MARTIN'S OPPOSITION TO RULE 11 INQUIRY; specifically, see: REPLY MEMORANDUM at pages 4-6.)

On or about June 4, 1984, Respondent Lewis, on behalf of Respondent Martin as plaintiff in state civil action no. 3AN-82-6724 above-referred, responded to defendant Paul Roller's second request for admissions as follows:

> "Request 2. That Plaintiff Calvin C. Martin checked the boxes in items 2,3,4 [that the permit was acquired by gift or inheritance]...
>
> " Answer. Plaintiff cannot truthfully admit or deny that he checked the box attached hereto as Exhibit "A". This is because Plaintiff is not certain whether he or Danny Martin checked the boxes. The boxes were checked by Plaintiff or Danny Martin in anticipation of the permit being transferred from Danny to Cal Martin." (Emphasis added)

A copy of Martin's responses is attached as Exhibit "A" to Petitioner's

MOTION FOR AN INQUIRY PURSUANT TO RULE 11.

On or about June 20, 1984, Respondent Lewis again on behalf of Respondent Martin in the above-referred action against Roller, filed an opposition to Roller's then-pending motion to dismiss and for partial summary judgment on the grounds of illegality of the alleged agreement, which opposition stated in part, on page 6 therein at paragraph 4:

> " The terms of the transfer provided that the defendant [Roller] was to pay plaintiff the sum of $100,000. at the end of the 1982 salmon season in consideration of the permit. In the event defendant elected not to make the payment or was unable to do so, defedant agreed to transfer the permit in lieu of payment. The agreement was not in writing and contained no provision granting plaintiff a lien or other encumbrance on the permit. Defendant was free to use the permit as he deemed fit nd was free to transfer the permit to a third party without notice to plaintiff." (Emphasis added)

On June 28, 1985, Petitioner amended his complaint alleging that Respondents Lewis and Martin intentionally or recklessly

made representations for the purpose of interfering with the contract between Roller and Petitioner, and further, that the statements and conduct made by Lewis were made in bad faith and are offensive to the ethical standards of the legal professions.

On or about February 10, 1986 and March 11, 1986, Petitioner obtained, pursuant to the Alaska Freedom of Information Act, documents from that state's Attorney General's Office. These documents evidence that Respondent Lewis made numerous contacts with the State of Alaska Office of Attorney General between the period August 12, 1982 and August 17, 1982 for the express purpose of obtaining a temporary restraining order to prevent the transfer of a salmon drift permit pending an action to recover the purchase price. The documents also evidence that Respondent Lewis was advised the remedy of injunction was not available to prevent the transfer of such a permit to a third party.

On or about July 25, 1986, the Commercial Fisheries Entry Commission instituted show cause proceedings against Respondents Calvin Martin and the Estate of Danny Martin, which show cause proceedings allege that Martin and his son provided false information to the Commission on numerous transfer forms involving numerous limited entry permits other than the permit which is the subject of this action. See: Petitioner's MOTION FOR A STAY OF DISCOVERY PROCEEDINGS OR, IN THE ALTERNATIVE, MOTION IN LIMINE AS TO WHETHER LIKE TRANSFERS CAN BE USED TO ESTABLISH A PATTERN AND PRACTICE OF CONDUCT ON THE PART OF DEFENDANT MARTIN AND/OR OTHERS and the exhibits "A" and "B" attached thereto. Those proceedings are still pending.

On January 16, 1987, Petitioner caused to be filed the deposition of Ray Johnson, a non-party and percipient witness to Respondent Martin's first consultation with

Respondent Lewis and Hal Horton, a senior partner in Lewis's law firm. Said deposition testimony disclosed that Respondent Martin advised at least Hal Horton that he had transferred the subject entry permit only for Roller's temporary use during the 1982 salmon season, and that at the close of that season, Roller was to return the permit to Martin. These statements, if true, would establish a prima facie violation by Martin of the terms of A.S. 16.43.150 (g) and 20 A.A.C. 05.731, supra, and were, of course, made prior to any contact by Respondent Lewis with the Commercial Fisheries Entry Commission.

On September 22, 1987, Respondent Martin dismissed with prejudice, his state court action against Roller.

BACKGROUND

The court is referred to Petitioner's MEMORANDUM OF POINTS AND AUTHORITIES FILED IN OPPOSITION TO DEFENDANT LEWIS'S MOTION TO DISMISS OR TRANSFER for a full analysis of the statutory and legislative background of the Limited Entry Act. A portion of that analysis is reproduced herein.

No person may operate gear in the commercial taking of a fisheries resource in the State of Alaska without a valid entry permit or a valid interim use permit which authorizes a permitee to commercially fish within a specific administrative area such as the Cook inlet. See: Alaska Statutes, hereafter, A.S. 16.43.140; 16.43.150 (a). All entry permits and all interim use permits are issued by the State of Alaska Commercial Fisheries Entry Commission which has exclusive jurisdiction over the granting of such permits. A.S. 16.43. 140.

Under A.S. 16.43.355(a), the Commission may revoke an entry permit if a person knowingly supplies, or assists in supplying, or fails to correct, false information provided to the Commission for the purpose of (1) permit applications, or (2) permit transfers.

Under A.S. 16.43.150(g) as hereinafter set forth, it is the clear and explicit legislative policy of the Limited Entry Act that a permit may not be encumbered in any manner or transferred with any retained right of repossession.

These prohibitions are clearly set forth on all applicable transfer forms including both the " Request for Permanent Transfer of Entry Permit" form and the "Notice of Intent to Permanently Transfer Entry Permit". A copy of these standard forms in blank were attached as exhibit "B" to PLAINTIFF'S POINTS AND AUTHORITIES IN

OPPOSITION TO DEFENDANT LEWIS' MOTION TO DISMISS OR TRANSFER. Both the applicable documents transferring the permit to Paul Roller from Danny Martin on June 17, 1982 and the subsequent attempted transfer from Roller to Petitioner contained these express prohibitions.

EXISTANCE OF JURISDICTION BELOW

Petitioner filed suit Number 34998 in the Superior Court of Siskiyou County on December 3, 1982 against Respondents. Respondent Stanley Lewis moved to remove the suit to the Eastern District of California, which was made by stipulation between the parties. Respondent Lewis then moved to dismiss the action or remove the same to the Federal District Court of Alaska. Pursuant to an order of the District Court, the case was removed to the United States District Court of Alaska. Answers were thereupon

filed by counsel for the respective Respondents. After various means of discovery were employed by Petitioner, in November, 1985, Petitioner moved the District Court for an inquiry pursuant to Rule 11 of the Federal Rules of Civil Procedure relative to an admission made by Respondent, which motion was denied on February 11, 1986. Depositions of the parties were taken in July 1986. Motions for summary judgment were filed by the respective Respondents and two motions in limine filed by Petitioner. After argument on the motions for summary judgment, the District Court below granted both Respondents' motions. The basis for the decision, adopted by the Court of Appeals in its decision, was that the public policy supporting the defamation privileges generally afforded to litigants and the "lawyer's privilege to act on behalf of his client" outweighs any facts presented by Petitioner tending to show an ulterior or collateral motive on the part of either a

party or his attorney. The Court stated that even if there was:

> "... falsehood in the testimony, whether there was some ulterior impropriety ... or motivation with respect to the attorney or the client would not defeat the privilege or give rise to the tort action. Just because something may be wrong doen't mean that the remedies are unlimited and extend to all persons." (App. A, p. 5)

The Court below in adopting the decision of the District Court has, thus, refused to limit the scope of the the privilege invoked by an attorney acting on behalf of a client regardless of the facts before it or the alleged tortious conduct evidenced by those facts. The Court also held that the principles set forth in Nix v. Whiteside, identifying the standards of a conduct reuired of an attorney in his representation of a client are inapplicable or distinguishable, and in citing Respondents' joint brief, adopted

Respondents' interpretation that the Nix decision in a criminal habeus corpus case " can in no way be construed as abrogating well-entrenced common-law defenses to tort actions (App. A, p. 6 adopting opposing brief at p. 22).

REASONS FOR GRANTING THE WRIT

This court has an opportunity herein to determine whether its decision in Nix v. Whiteside, 89 L. Ed. 2d 123, 106 S. Ct. 988 (1986) is limited by the absolute privilege generally afforded litigants and, to a similar extent, to their counsel relative to statements made in any legislative or judicial proceeding. In doing so, this Court will also have the opportunity of deciding a parallel issue, namely whether an attorney is absolutely immune from liability to third parties for his professional acts on behalf of a client, which acts were committed in at least reckless disregard of statutory

authority. Admittedly, this Court in Nix was not specifically dealing with a question invoving privilege in a judical proceeding. However, the Nix decision does provide a commentary on the standards which both bind an attorney and limit the scope of his advocacy in the representation of a client, and that an attorney's duty of loyalty and advocacy is:

> " ...limited to legitimate and lawful conduct...Although counsel must take all reasonable lawful means to obtain the objective of his client, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law. This principle has consistantly been recognized in most unequivocal terms by expositors of the norms of professional conduct since the first Canons of Professional Ethics were adopted...."

Citing Canon 32 of the first professional Canons of 1908, this Court reaffirmed that an attorney must "...observe and advise his client to observe the statute law. Of course, said the Court, "this Canon

did no more than articlualte centuries of accepted standards of conduct." Id at 134.

> "These standards confirm that the legal profession has accepted that an attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the laws and standards of professional conduct; it specifically insures that an attorney may not use false evidence." Id at 135-136.

Petitioner believes that review by this Court is necessary to determine whether the standards of professional conduct reinforced by the Nix court is either defeated or limited by the privilege which generally protects litigants in a judicial or quasi judicial proceeding from tort liability.

THE PURPOSE OF THE PRIVILEGE

The purpose of the privilege is to afford litigants the utmost freedom of access to the courts. Consistant with that purpose, the California Supreme Court, among

generally applies to tort claims which impinge upon the freedom of litigants and their attorneys to pursue litigant's interests, even if such claims are not entered under the "defamation" rubric to which the tradition has traditionally been applied. See: Albertson v. Raboff 46 C. 2d. 375 at pp. 38) -381. The fact that the privilege has always enjoyed a broad scope is underscored in the codification of California's comparable privilege statute set forth in Civil Code section 47. In drafting section 47, the Code Commission in 1872 relied on cases which held a comparable privilege in New York applicable " whenever a person speaks ... in the assertion of his own rights, or to vindicate and protect his interest," and to any statement made "in the due course of the proceeding, in the discharge of a duty or the prosecution or defense of a right". (Thorn v. Moser 1 Denio 488, 493 (1845); Perkins v. Mitchell 31 Barb

461, 468, cited in 1 Code Comm'n, note 8, at p. 25

Since any case in which the privilege is raised will, by definition, involve some "judicial proceeding", the plaintiff in such a case will inevitably be attempting to demonstrate an improper use of judicial power against him under any colorable theory.

I. ABSOLUTE IMMUNITY SHOULD NOT SHIELD EITHER A LITIGANT OR HIS COUNSEL WHO ACT IN AT LEAST RECKLESS DISREGARD OF STATUTORY AUTHORITY FROM A CIVIL ACTION FOR DAMAGES BY AN INJURED THIRD PARTY PLAINTIFF.

The Restatement of Torts, section 588, com. e, at p. 251 states that only a communication which has some relation to a proceeding that is acutally contemplated in good faith and under serious consideration by a possible party to a proceeding is absolutely privileged. Specifically:

> " When the communication has some actually contemplated in good faith and under serious consideration by ...a possible party to the proceeding," the communication is privileged.

Thus, said one Court, an absolute privilege "only protects communication which threaten litigation for nontortious purposes" and brought in "good faith". Herzog v. A Co., 138 Cal. App. 3d 357, 188 Cal. Rptr. 155, 158 (1983).

Petitioner has argued both to the District Court and the Court of Appeals below that attorneys either have not or should not be afforded such an absolute privilege. Specifically, in the case at bar, Petitioner has argued thus far unsuccessfully that representations initially made to an extra-judicial body by an attorney for purposes inconsistant with the objects of litigation and solely to prevent the transfer of the subject entry permit are neither absolutely nor conditinally privileged. Specifically,

Petitioner argued that, as a matter of law, the statements alleged to have been made by Respondent Lewis on behalf of Respondent Martin to an agent of the Commercial Fisheries Entry Commission disclose an illegal and unenforceable interest in the subject entry permit by Martin in violation of A.S. 16.43.150 (g). As a matter of law, Martin could not be a litigant or participant authorized by law, nor could the communication be made to achieve the lawful ends of litigation. See: Younger v. Soloman (1974) 38 Cal. App. 3d 289, 113 Cal. Rptr. 113, citing Bradley v. Hartford Accident and Indemnity Co. 30 Cal. App. 3d 826 which set forth the criteria necesssary in California to afford an absolute privilege to particicpants in a judicial proceeding, namely: (1) that the publication was made in a judicial proceeding; (2) that it had some connection or logical relation to the action; (3) that it was made to achieve the objects of litigation, and (4) that it

involved litigants or other participants authorized by law.

Both the American Bar Association Canons and virtually all state rules governing the duties of an attorney require an attorney only to maintain such actions, proceedings, or defenses only as appear to him legal and just, and to employ for purposes of maintaining the causes confided to him only such measures as are consistant with truth. See for instance: California Business and Profession section 6068 and the Code Commissioner's forceful statement to the original section that a lawyer is bound by the same moral obligations as other men and cannot properly suport a bad cause. Though an attorney should be zealous in claiming every legal remedy or defense, he must act within the law. " The office of attorney does not permit, much less does it demand of him for any client violation of law or any manner of fraud or chicane.."

(A.B.A. Canon 15) See also: A.B.A. Canon 31 [a lawyer's responsibility for advising questionable transactions, suits, or defenses]; A.B.A. Canon 32, which states that it is improper for an attorney to advise a violation of the law.

Like many other jurisdictions, California Rules of Professional Conduct 2-111(B)(2) requires a California attorney to withdraw if he knows that his continued employment will result in a violation of the State Bar Act. The Rule permits an attorney to withdraw if the client either personally seeks to pursue an illegal course of conduct or insists that the attorney pursue either an illegal course of conduct or one prohibited by the State Bar Act. See: California Rule of Professional Conduct 2-111 (C)(1) (b) and (c). To the same effect, see Alaska Discliplinary Rules adopted from the American Bar Association rules, specifically DR 1-102 (A)(4).

Moreover, the model rules proposed by the Kutek Commission would have permitted an actual disclosure of client fraud if necessary to prevent fraud likely to result in "substantial injury to the financial interests or personal property of another".

An attorney is an officer of the Court. While he should represent his client with a singular loyalty, that loyalty does not require that he act fraudulently or dishonestly:

> "On the contrary, his loyalty to the court, as an officer thereof, demands integrity and honest dealing with the court. And when he departs from that standard in the conduct of a case, he perpetuates a fraud upon the court." 7 J. Moore, Moore's Federal Practice, section 60.33 at 513 (1971)

Even in the absence of an intent to defraud, a reckless disregard of the rules of statotory authority will constitute a fraud on the court when such actions deprive a party of hs rights. Mallonee v. Grow 502

P. 2d 432 at 436-437 (Alaska, 1972). Thus, although an attorney is not liable to third persons for acts committed in good faith in the performance of professional activities as an attorney for his client, if however, an attorney is actuated by malicious motives, or shares the illegal motives of his client, he may be personally liable with the client for damage suffered by a third person as a result of the attorney's actions [Fns. omitted] 7 Am. Jur. 2d, Attorneys section 232, p. 275 (1980); see also: Newburger, Loeb & Co. v. Gross (1977, CA 2 NY) 563 F 2d 1057 at 1080, where the court stated:

> " Under New York law, an attorney generally cannot be held liable to third parties for actions taken in furtherance of his role as counsel unless it is shown that he 'did something either tortious in character or beyond the scope of his honorable employment'... Thus, while an attorney is privileged to give honest advice, even if erroneous, and generally is not responsible for the motives of his clients, admission to the bar does not create a license to act maliciously,

> fraudulently, or knowingly to tread upon the legal rights of others.. [cites]"

Petitioner submits that an attorney has probable cause to represent a client in litigation only when, after a reasonable invesigation and industrious search of the legal authority, he has formed a honest belief that his client's claim is tenable in " The attorney must entertain a subjective belief that the claim merits litigation, and that belief must satisfy an objective standard." Tool Research & Engineering Corp. vs. Henigson (1975 2d Dist) 46 Cal. App. 3d 675 at 683, 120 Cal. Rptr. 291.

It is only the attorney's reasonable and honest belief that his client has a tenable claim that is the attorney's probable cause for representation, and not the attorney's conviction that his client must prevail.

The Second Circuit has ruled that an

attorney cannot accept information from his client as true and rely on it in dealing with third parties when the attorney should know that further inquiry would show the information to be untrue. U.S.vs. Benjamin (2nd. Cir. 1964) 328 F 2d. 854, 863.

Thus, an attorney's duty is to "represent his client zealously.... [seeking] any lawful objective through legally permissible means....[and presenting] for adjudication, any lawful claim, issue or defense" A.B.A. Code of Professional Responsibility EC 7-1, DR 7-101 (A)(1). Emphasis added.

California has long adopted the view that an attorney may not, with impunity, either conspire with a client to defraud or injure a third person, or engage in any tortious conduct toward a third person. Roberts v. Ball, Hunt, Hart, Brown, and Baerwitz 57 C.A. 3d 104, at 109, 128 Cal. Rptr. 901:

> "If ...an attorney is actuated by malicious motives, or shares the illegal motives of his client, he may be personally liable for damage suffered by a third person as a result of the attorney's actions."

But for the assertion of the privilege, the facts unquestionably raise a triable issue of fact that Respondent Martin and possibly other members of Respondent Lewis's law firm used the offices of the Commercial Fisheries Entry Commission as well as the process of the state court proceeding against Roller for an ulterior purpose not properly obtainable in the proceeding itself and contrary to existing statutory authority, namely, to prevent the transfer of the subject limited entry permit from Roller to any third party.

It is clear that Respondent Lewis was promoting his client's unlawful interest in the permit. There is also prima facia evidence that Lewis or at least a senior member of his firm was given facts by Martin

at the initiation of his representation and prior to any statement, publication, or initiation of any course of conduct that his client was asserting an illegal interest in the permit. Thus, any contact with the Commission could only have been made at the peril of both his client and the subject entry permit. Further, the relevant information tending to show his client's motives was not in the hands of an opposing party or third party, but provided by Martin at the initiation of the representation. See: Kamen v. American Telephone and Telegraph 791 F 2d 1006 at 1012 (2d. Cir. 1986).

Petitioner further submits that the opinion of the Court of Appeals contained several errors of law which have resulted in a miscarriage of justice. First, the Court of Appeals did not actually reach the threashold question of whether Martin could make any claim to the permit as a matter of

law. To the extent that Petitioner contends the totality of Respondent Lewis's actions constitutes tortious conduct in disregard of existing statutory authority on behalf of a client who could legally have no claim in the permit which formed the subject matter of Petitioner's contract with a third party, the Court must first make such a determination. If Martin had a claim of right or color of title in the permit, both he and his attorney would be privileged to prevent the transfer of the permit to Petitioner and thus, to interfere with Petitioner's business relationship. See: Prosser, Law of Torts. section 115 at page 795, cited to the District Court below. However, based upon the uncontroverted facts, Martin could not have had an interest in the permit since any claim any claim he would have made or did make, was illegal and unenforceable as a matter of law. See: A.S. 16.43.150 (g); 20 AAC .05.731; Baker v. Brown 688 Pacific Reporter 943 (Alaska. 1984).

Petitioner did not, as the Court of Appeals stated, request the Court to decide the state court action brought by Respondent Martin against Roller. (App, A, p. 7). Rather, the question before the Court was and remains whether Respondent Martin's legal status in relation to the permit provided a good faith basis for Respondent Lewis to promote a tenable claim on behalf of his client. Such a threshold determination is crucial. As the Alaska Supreme Court noted in Schneider v. Pay N' Save, 732 P.2d 619, 624 (Alaska, 1986):

> " The comments to Restatement section 595 indicate that a statement made for the protection of a lawful business, professional, property, or other pecuniary interest falls within the [privilege] if it is called for by a legal or moral duty or by generally accepted standards of decent conduct." (Emphasis added)

Moreover, Petitioner's pleadings and brief to the Court of Appeals make it clear

that Respondent Lewis's contact with the Commission, while not the sole tortious conduct on which Petitioner relied, was unquestionably, among the tortious acts which were included in his amended complaint for intentional interference with contract and for outrageous and despicable conduct. The Court of Appeals, however, in focusing on Lewis's initial contact, appeared to have disregarded both the purpose of the contact and Martin's lack of a legal right in the permit itself, as well as the subsequent wrongful acts made in the process of litigation.

By not deciding the question of whether Martin had a lawful interest in the permit, it left unanswered and overlooked the other facts relied upon by Petitioner to support his various claims against Respondent, but also left unanswered the main issue of institutional significance, namely, the scope of immunnity to be afforded an

attorney in support of his client's claims, whether legitimate or otherwise.

Respondents have, in both the District Court and the Court of Appeals, raised the spectre of vigorous advocacy chilled by the fear of individual liability. Further, the Court of Appeals itself stated that Petitioner's reasoning if "limited to suits brought to protect interests that are not 'illegal and unenforecable' ....would apparently require a court to assess the merits of the underlying litigation before applying the privileges" (App. A, p. 4).

The concerns uttered by the Court of Appeals are misplaced. A court has inherant power to grant relief where fraud has been perpetrated upon it. Hazel-Altas Glass Co. v. Hartford-Empire Co. 322 U.S. 238, 244 (1944); see also: Universal Oil Products Co. v. Root Refining Co. 328 U.S. 575, 579.

Under Federal Rule of Civil Procedure 60 (b) and parallel Alaska Rule of Civil Procedure 60 (b), a court may set aside a judgment for fraud, misrepresentation, or other misconduct of an adverse party. See: Mallone v. Grow supra. Where the fraud is learned of prior to judgment, a dismissal is warranted. Hazel-Altas Glass Co. v. Hartford-Empire Co. 322 U.S. at 250; Keystone Co. v. General Excavator Co., 290 U.S. 240, 246 (1933).

The Alaska Supreme Court in Mallonee v. Grow, supra, recognized that whether the deprivation of a party's rights by the action of a judicial tribunal are attributable to a willful intent to defraud or a reckless disregard of the rules of statutory law, the court has the same duty to rectify the wrong:

> "The mechanism for protecting and maintaining the decisional integrity of our judicial system is found in the statutes and rules which govern the

> procedures to be followed by parties, attorneys, and judges. The purposeful or reckless disregard of these procedural safeguards which results in the deprivation of substantive rights constitures an impermissible corruption of the court process." Mallonee v. Grow, supra.

An attorney is an officer of the court whose position damands integrity and fair dealing in dealing with the court. When he ddeparts from this standard, he perpetuates a fraud upon the court. Mallone v. Grow, supra 502 P. 2d at 438,439; Accord: Kupferman v. Consolidated research & Mfg. Corp. 459 F. 2d 1072, 1079 (1972); H.K. Porter Co. v. Goodyear Tire & Rubber Co., 536 F. 2d 1115, 1118-1119 (1976)

Further, the statutory application of the defamation privileges has been held only to attach only tc statements or publications, but not to the actions of the person invoking the privilege. Rosenfeld, Meyer, Susman, v. Cohen 146 Cal. App. 3d 200

at 234 (1983).

It would be a rare case in which an ulterior purpose or the intent to abuse process in some form would be discernable from the face of a pleading or application for the issuance of process. Necessarily, proof of such ulterior or collateral purpose or intent to misuse the process of the court will generally rest in both the statements counsel as is the case here.

Petitioner has shown by prima facie evidence that Respondent Martin advised his attorneys prior to Lewis's contact with the Commercial Fisheries Entry Commission that he was involved in activities which were not only statutorily suspect, but in fact, were clear violations of A.S. 16.43.150 (g). Petitioner has further shown that the failure by Lewis to disclose to the Commission that Martin or his son, not Roller, supplied the allegedly false information that both formed the charging

allegation against Roller and prevented the transfer of the subject permit to Petitioner, constituted a deliberate suppression of evidence and a fraud upon that judicial body. Clearly, there are several factual issues to be tried unless the privilege bars the action at the threshold.

In defining the scope of the analogous attorney-client privilege, one court has stated that such a privilege:

> " [C]annot be used as a sword or weapon of offense to enable persons to carry out contemplated crimes against society. The law does not make the law office a nest of vipers in which to hatch out frauds and perjuries.: Gebhardt v. United Rys. Co. of St. Lewis (Mo. 1920) 220 SW 677, 679; See also: State v. Phelps (Or. Ct. App. 1976) 545 P. 2d 901, 904-905.

A client's communication to an attorney may not be protected as a confidence if the client discloses before testifying his intent to commit perjury and

the attorney cannot dissuade him from testifying. Whiteside v. Nix supra; See also: California Evidence Code section 956 which provides that there is no attorney-client privilege if " the services of the lawyer were sought or obtained to enable anyone to plan or commit a fraud". In construing the Kansas attorney-client privilege which uses similar language, the Kansas Supreme Court stated that: "The announced intention of a client to commit perjury ... is not included within the confidences which an attorney is bound to respect." Such a communication is not privileged for any purpose. State v. Henderson (1970) 468 P. 2d 136, 141.

Clearly attorneys clearly can be held liable for conspiracy with clients who intend to defraud third parties. See: Parkinson Co. v. Bldg. Trades Council (1908) 154 C 581. Further, an attorney does not have to commit an overt tortious act to be

held liable as a co-conspirator. Greenwood v. Moorardian (1955) 137 CA 2d 532. One jurisdiction has held that an attorney-client relationship may not even exist if the client uses an attorney to engage in a fraudulent scheme. See: Hughes v. Mead (Ky. 1970) 453 SW 2d 538.

Thus, an attorney who encourages the commencement of proceedings for a collateral purpose at odds with and in disregard of statutory authority is engaged in a perversion of justice and ought not to be shielded from the judicial process and rules he himself ignores. In re Stephens 77 C. 357, 19 P. 646 (1885).

However, to hold as did both the District Court and the Court of Appeals that an ulterior imprority is absolutely privileged regardless of motive and regardless of the prima facie facts before the Court emasculates such authority.

Clearly, there is a strong public policy in favor of free access to the courts. Consistant with that policy, attorneys should be allowed great latitude in using legitimate means to protect the rights of their clients through litigation.

On the other hand, the power of the courts is great and the process of justice allows many opportunities for unscrupulous process to improper ends. The law must protect against the misuse of the tremendous coercive effect of the judicial process. To use the defamation privileges to shield such improper activity conflicts not only with the language of Nix, but also with its purpose.

Petitioner submits that the language of Restatement of Torts section 595 is mirrored in the language of this Court in Nix, which requires a balance to be struck between the interest of access to the courts and the

interests of preventing an abuse and perversion of the function and purpose of the judicial system.

II. THE ISSUE IN THIS CASE HAS NOT BEEN DECIDED BY THIS COURT NOR HAS THIS COURT OTHERWISE SPOKEN PLAINLY ON THE ISSUE.

Both Respondents and the Court of Appeal rely on the standard advanced in Nizinski v. Currington 517 P. 2d 754, 756 (Alaska 1974) that the privileges advanced in Nizinski and approved by most jurisdictions, protect both the staatmeents and subsequent actions of Respondents. Although Nizinski dealt with the invocation of the privilege on behalf of an affidavit of an arbitrator in detailing the rationale of his decision, the generally unlimiting language of Nizinski and similar cases cited by Respondent provides a rationale for the decision of the Court of Appeals.

This Court has stated that " [f]reeing

the judicial process of harrassment and intimidation has been thought to require absolute immunity even for advocates and witnesses." Forrester v. White, ____ U.S. ____ (1988), citing Briscoe v. LaHue 460 U.S. 325 (1983); Butz v. Economu, 438 U.S. 478, 507, 57 L.Ed. 2d 895, at 916, 98 S Ct 2894 (1978). However, this Court has also recognized absolute immunity only in "exceptional circumstances" where public polcicy makes it "essential" . Butz v. Economu, Id; Stump v. Sparkman, 435 U.S. 349, 55 L. Ed. 331.

Petitioner submits that the purpose of the privilege is shield attorneys and their clients from tortious liability to third parties for damage they cause by intentionally violating existing statutory authority. Petitioner further submits that any public policy served by the privilege is distorted by such protection, that no

public interest is served by a lawyer's intentional misconduct, or at least obvious disregard of the rules of statutory authority and that public policy ends where the public peril begins.

CONCLUSION

This Court should review this case to determine the scope of the privilege to be afforded both litigants and their counsel in light of the principles ennumerated in Nix v. Whiteside. The interpretation of the privilege by the Court below makes such a ruling a matter of substantial public concern and importance. For these reasons, it is respectfully submitted that a petition for a writ of certiorari should be granted.

FRANK V. AIELLO
P.O. Box 337
Mt. Shasta, CA 96067
Tel: (916) 926-3125

Petitioner Pro Se

INDEX

FILED
NOV 23 1987
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK V. AIELLO,	)	No. 87-3647
Plaintiff-Appellant	)	D.C. No. CV-83-193
v.	)	
	)	* MEMORANDUM
CALVIN MARTIN; STANLEY LEWIS,	)	
Defendants-Appellees	)	

Appeal from the United States District Court
for the District of Alaska
H. Russel Holland, District judge, Presiding
Argued and Submitted November 5, 1987
Seattle, Washington

Before: ANDERSON, NORRIS, and HALL, Circuit Judges

Appellant Aiello, plaintiff below,

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Circuit Rule 36-3.

appeals the district court's award of summary judgment to defendant-appellees Martin and Lewis. The district court held that "both Martin and Lewis had numerous multiple privileges, any one of which would be sufficent to prevent the action from going forward." Transcript of Hearing before the Honorable Andrew J. Kleinfeld, United States District Court Judge at 32 (hereinafter Summary Judgment transcript). The trial court specifically relied upon the privilege protecting a witness from tort liability for his testimony, and the lawyer's privilege to communicate on behalf of her client in preparation for litigation. Id at 33-34 (citing Nizinski v. Currington 517 P. 2d 754, 756 (Alaska 1974). Therefore, under the trial court's reasoning, Lewis's telephone call to the Alaska Commercial Fisheies Entry Commission (CFEC) and Martin's testimony regarding who checked the box indicating the transfer from Martin to Roller was a "gift" are both

privileged statements which cannot give rise to a tort action.

Aiello does not dispute that the privilege identified in Nizinski would ordinarily protect Martin and Lewis's statements.[1] Rather, he argues that the privileges should not apply because Martin and his attorney, Lewis, were pursuing Martin's "illegal and unenforceable interest" in the fishing permit when they made their statements. See Blue Brief at 25-29. According to Aiello, Martin's alleged contract with Roller to transfer the permit to him in exchange for $100,000. or, in the event Roller was unable to pay, to return

1. Appellees correctly argue that Nizinski supports their contention that Martin and lewis's statements were protected by multiple privileges. See Red Brief at 8-16, 25-27. Aiello does not disagree in his brief. He appears to concede that if martin had an enforceable interest in the permit, then the defamation privileges would protect appellees' statements.

the permit. (see Excerpt of record at 46), violated Alaska law. Alaska Statute 16.43.150 (g) provides that "an entry permit may not be: (1) pledged, mortgaged, leased, or encumbered in any way; (2) transferred with any retained right of repossession or foreclosure."[2] Aiello argues that since the Martin to Roller transfer appears to be secured by the permit in violation of Alaska law, any interest Martin now has in the permit is illegal and unenforceable.

Aiello essentially suggests that the defamation privileges are limited to suits to protect interests that are not " illegal and unenforceable." Aiello's reasoning would apparently require a court to assess the merits of the underlying litigation before applying the privileges.

---

2 An Alaska case construing this section held that a promise "to return the permit... is a security interest and thus, violates A.S. 16.43.150 (g)." Baker v. Brown 688 P. 2d 943, 947 (Alaska 1984)

Aiello's argument was rejected in the court below. The district court refused to limit the scope of the privileges just because there may have been " a wrong by someone in the process." Summary Judgment Transcript at 33. The district court said:

> " In this case, a lawyer's privilege to act on behalf of his client, the privilege of both to communicate with the agency, the privilege of Martin to testify before the agency are all applicable. The public policy is clear and strong that the agency needs to facilitate this kind of communication in order to carry out its mandate so whether there was falsehood in the testimony, whether there was some ulterior impropriety, or -- or motivation with respect to the attorney or the client would not defeat the privilege or give rise to a tort action. Just because something may be wrong doesn't mean that the remedies are unlimited and extend to all persons.

Id at 34. The district court, therefore, refused to limit the absolute privileges identified in Nizinski because of the "clear and strong" public policies supporting these privileges.

Aiello fails to cite any authority suggesting that the defamation privileges are abrogated as to litigants whose lawsuits are notwell-founded. His reliance on cases such as Nix v. Whiteside 106 S. CT. 988 (1986), is completely misplaced. See generally Red Brief at 22-25 (arguing persuasively that Aiello's authority is either inapplicable or distinguishable.)[3]

In sum, the clear and strong policies underlying the defamation privileges compel the conclusion that Martin's testimony before the CFEC, his responses to requests for admission in Martin v. Roller, and Lewis's telephone call to the CFEC prior to

---

3 Appellees also argue that Aiello's interpretation of the privilege is erroneous for the further reasons that it is based on California's statutory test, not Alaska's common law test, and its premise (that Martin's lawsuit is without legal foundation) ignores the fact that Martin v. Roller has survived a summary judgment motion in Alaska superior court based upon the same legal grounds that Aiello is urging here. See Red Brief at 18-19.

filing suit on behalf of Martin, cannot be the basis for liability in tort. There is no authority requiring this court to decide the merits of Martin v. Roller before deciding that the defamation privileges apply in this case.

Aiello also argues that the district court abused its discretion in awarding $3,961.32 in attorney's fees to Lewis and Martin.[4] Aiello contends that this award represents an abuse of the trial court's discretion to award fees because he has presented evidence that Lewis and Martin acted in bad faith and in "wanton disregard of statutory authority." SeeBlue Brief at 45. Aiello claims that even if the defendants' conduct is held to be privileged as a matter of public policy, an award of attorney's fees is nevertheless unjustified because the defendants have not prevailed on

---

4 This figure represents approximately 80 % of the actual fees incurred by the defendants. See Red Brief at 44.

the merits. See id. (citing Greater Los Angeles on Deafness v. Community Television of Southern California, 813 F. 2d 217 (9th Cir. 1987). Greater Los Angeles Council holds that plaintiffs who successfully sued a television station for failure to provide sufficent access to programming for handicapped persons, but whose victory was eventually reversed on appeal, could still be "prevailing parties" under hte Rehabilitation Act. Id. at 219-21. This case in no way supports Aiello's contention that defendants who assert a privilege as a complete defense to plaintiff's tort lawsuit are not prevailing parties.

Attorney's fees in diversity actions are governed by state law. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 259 n. 31 (1975); Stokes v. Reeves, 245 F. 2d 700, 702 (9th Cir. 1957). Rule 82 of the Alaska Rules of Civil Procedure provides

for an award of attorney's fees to the prevailing party. Whether an allowance is made is left to the discretion of the trial court. Macri v. United States, 353 F. 2d 804, 811 (9th Cir. 1965).

Appellees prevailed in the court below by successfully urging their litigation privileges as complete defenses to Aiello's suit. The district court therefore had discretion to award appellees fees. The record fails to support the claim that this discretion was abused.

Finally, Aiello's claim that certain motions in limine should have been decided before summary judgment was granted, see Blue brief at 29-30, is unfounded. The goal of Aiello's motions was to obtain a judicial determination that the Martin-Roller transfer was illegal. Garrett v. City & County of San Francisco 818 F. 2d 1515 (9th Cir. 1987), upon which Aiello relies, is

inopposite. The undecided discovery motions in Garrett were directly relevant to the summary judgment motion, since if the evidence sought in discovery had supported plaintiff's case, summary judgment would have been inappropriate. In the instant case, the outcome of the court below in no way depended on a finding as to the legality of the Martin-Roller transfer. Thus, the district court did not err in granting summary judgment prior to ruling on the motions in limine.

AFFIRMED.

FILED
JAN 6 1988
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK V. AIELLO,	)	No. 87-3647
Plaintiff-Appellant	)	D.C. No. CV-83-193
v.	)	
	)	O R D E R
CALVIN MARTIN; STANLEY LEWIS,	)	
Defendants-Appllees	)	

Before: ANDERSON, NORRIS, and HALL, Circuit Judges

The Court's Unpublished Memorandunm filed November 23, 987 is hereby amended to change "$3,961.32 in attorneys fees" at page 5, line 2, to "$45,350.00 in attorney's fees."

Filed
February 5, 1987
United States District Court
District of Alaska
By _____/s/_____, Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

FRANK V. AIELLO,	)	
	)	
Plaintiff,	)	
	)	
	)	
vs.	)	
	)	
	)	
	)	
CALVIN MARTIN and STANLEY LEWIS,	)	
	)	
	)	
Defendants.	)	
_____	)	O R D E R

A 83-193 CIV

For the reasons stated orally on the record February 4, 1987 at the conclusion of the arguments on the motions for summary judgment,

IT IS ORDERED that:

(1) Defendants' motions for summary judgment are granted.

(2) Defendants are entitled to judgment as a matter of law on the first and second of plaintiff's claims for relief.

(3) Plaintiff's third claim for punitive damages, depends on the first two, so defendants are entitled to judgment on the third claim for relief as well. This leaves nothing further for trial, so this case is fully adjudicated upon the motions for summary judgment. -

(4) Defendants are entitled to an award of costs and attorneys fees against plaintiff. Defendants shall file their cost bill and motions for attorneys fees within 30 days of the date of this order.

DATED at Anchorage, Alaska, this 5th day of February, 1987.

Andrew J. Kleinfeld

ANDREW J. KLEINFELD
United States District Judge

Filed
February 5, 1987
United States District Court
District of Alaska
By /s/, Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

FRANK V. AIELLO, Plaintiff, vs. CALVIN MARTIN and STANLEY LEWIS, Defendants.	)	JUDGMENT

A 83-193 CIV

This case having been decided favorably to defendants on all causes of action on motions for summary judgment,

IT IS HEREBY ORDERED AND ADJUDGED,

(1) That plaintiff take nothing and that this action be dismissed on the merits against plaintiff.

(2) That defendant Calvin Martin recover $ 24,000.00 as attorneys fees and $3,961.21 as costs for a total of $27,961.32 from plaintiff with interest thereon at _____%.

(3) That defendant Stanley Lewis recover $21,350.00 as attorneys fees and $_____ as costs for a total of $21,350.00 from plaintiff with interest thereon at _____%.

DATED at Anchorage, Alaska, this 5th day of February, 1987.

Interest pursuant to 28 USC 1961 at 5.75%.

Andrew J. Kleinfeld

ANDREW J. KLEINFELD
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

FRANK V. AIELLO,	)
	)
Plaintiff,	)
	)
vs.	)
	)
	)
	)
CALVIN MARTIN and STANLEY LEWIS,	)
	)
Defendants.	)
	)

Opinion of the District Court made after oral argument on Motion for Summary Judgment, Wednesday, February 4, 1987 (Telephonic) before the Honorable Andrew J. Kleinfeld, District Judge, beginning at page 30 of the transcript of proceedings:

THE COURT: I'm granting the motion for summary judgment. I believe that most of the arguments by defendants are well taken. I'm going to recite some points that particularly struck me, but these are not

exclusive of the other grounds upon which I'm granting the motions. It appears to me that Martin sold the permit to Roller, Roller sold the permit to Aiello for a lower price, Aiello, after -- I believe he -- as he put it in his deposition, " Looking at the law and thinking about it " decided to take his chances on the legal status. Aiello did not get what he bargained for. He didn't get the permit and pay the $64,000. to Roller. However, he has not sued Roller for breach of contract. Instead, he sued Martin, who did not own the permit, but purported to sell his son's permit to Roller, and Martin's lawyer, Lewis. He has not sued them on a theory of subrogation standing in Roller's shoes for breach of the contract to sell the permit to Roller, nor has he sued as an assignee of whatever rights Roller might have had against Martin for breach of Martin's contract to sell to Roller. It can only be inferred considering the six files of extensive debate that has proceeded

today's ruling that Mr. Aiello gave the most careful legal thought on how to proceed and decided on a tactical and strategic basis that he would be better off to proceed in tort against the parties that he did rather than in contract either against the party with --with whom he had made the contract, or against the party who contracted with that intermediary.

The case has proceeded on a motion for summary judgment. It's not a 1236 motion. Parties have had plenty of time, it's quite an old case, to refine their theories, and it does appear that Mr. Aiello theories of the case were chosen after careful strategic consideration, and that he stuck to them for stategic reasons, so there is no particular reason, I suppose, that there is any defect in his pleadings. Got the case off on the wrong track.

On the theory of interference with contracts, the tort isn't so simple as to say that anyone who does anything that

interferes with someone else's enjoyment of economic advantages is liable in tort to the party who would have had the pleasure of performance of someone else's contract.The elements layed out in Bendix Corporation v. Adams 610 P. 2d 24, Alaska 1980, are number one, a valid contract between plaintiff and another person. Presumebly that would be Aiello and Roller. Two, that defendant, that would be Lewis and Martin had knowledge of the contract and that their intent was to induce a breach of that contract. Three, that the contract was breached by the other party, that is that Roller breached the contract with Aiello. Four, that that the breach was caused by defendant's wrongful and unjustified conduct. And five, that the plaintiff suffered damage as a result of the breach. It appears to me that in the face of a motion for summary judgment, Aiello has not shown, by affidavits or other appropriate submissions, the existance of any one of these five elements, let alone

all five. He hasn't proved the validity of the contract between himself and Roller, although perhaps that's conceded by the defendant since they haven't argued that. He certainly has not established that the defendants knew of the contract and intended to induce a breach of the Roller/Aiello contract. The evidence tends more to show an intent to prevent Roller from getting the permit from Martin rather than to prevent Aiello from getting the permit from Roller, and so forth through the elements.

Moreover, on the issue of privilege, it does appear that both Martin and Lewis had numerous multiple privileges, any one of which would be sufficent to prevent the action from going forward.

Now, I am uncomfortable with Martin's lawyer calling a former law clerk in his firm who's now a hearing officer on hte phone instead of sending a letter with a cross-carbon to Aiello, or -- some other procedure that would give Aiello fair notice

of the communications which were being made. There's some circumstances in which that kind of conduct is perfectly appropriate. For example, an ex parte report to the IRS that somebody has committed a tax fraud is encouraged. The government offers a 10 percent reward. There are other areas where that kind of contact is -- is wrongful, such as if a lawyer were to call a former partner who is now a judge, advise him of some matter in one of his files so that the judge would pull out the file and take some action on it. Anyone could recognize that a lawyer in that situation would be doing something wrong.

As for whether the -- the Fisheries Commission contact was right or wrong, I don't know. I make no finding on that. I don't think I need to make a finding on that. Even if it was wring from the point of view of -- of a grievance proceeding, which this is not, and for which I make no suggestion or -- or finding, even if it was

wrong it would not amount to an actionable tort of which Aiello coukld take advantage. Mr. Aiello's argument seems to assume that all he has to do is prove a wrong by someone in the process and -- and he has a cause of action, but it's not that simple. The Nizinski case --- Nizinski vs. Currington 517 p. 2d 754, Alaska 1974, says that " Defamatory testimony by a witness in a judicial proceeding pertinent to the matter under inquiry is absolutely privileged." In that case, we're talking about defamatory testimony which is harmful to somebody's reputation, and is also false. False statements under oath in testimony harmful to someone's reputation. They're absolutely privileged in Alaska, as in most places, because of the public policy of facilitating testimony in such forums.

In this case, the lawyer's privileged to act on behalf of his client, the privielge of both to communicate with the agency, the privilege of Martin to testify before the

agency, are all applicable. The public ploicy is clear and strong that the agency needs to facilitate this kind of communication in order to carry out its mandate so whether there was a falsehood in testimony, whether there was some ulterior impropriety or --- or motivation wuith respect to the attorney or the client would not defeat the privilege or give rise to a tort action. Just because something may be wrong doesn't mean that the remedies are unlimited and extend to all persons. For example, in the Nizinski case, suppose the agency wnt to the Attorney General, presented evidence to the Attorney General that defamatory testimony had been knowingly given. The Attorney General might, in such a -- I'm now making a hypothetical case rather than the Nizinski case, might have a perjury indictment to seek against the -- whatever witness had given knowingly false testimony. Nevertheless, the person harmed by it would not have the defamation

action under the Nizinski case. That's not an unusual result. There's nothing anomolous about it. That's -- that's how privielges work.

With regard to the claim of outrage, the general statements in the -- in the books, both the Alaska case law and the restatement in Proser, defining that tort approach meaningless. It's not practical to try to determine from the general statements exactly what constitutes the tort of outrage. However, when one looks at the cases that have been decided under the tort of outrage, one sees a pattern. There have been certain kinds of conduct which have been successfully litigated, at least past summary judgments or motions for directed verdict on the theory of the tort of outrage, which is the one urged by the plaintiff. None of them are the slightest bit like the case at issue. They --the -- some of the examples have been discussed by the parties in their briefs. Many are very

extreme things such as telling a woman that her husband has just died when -- when he's alive and well, and the purpose was just to make her miserable, that type of thing. Nothing like the case at issue. The practical consequences of extending the tort of outrage to cases like the one at issue are that there would be no tort law at all. Anytime a party could persuade a jury that somebody had acted in a fashion that the jury would like to punish, the jury could award unlimited damages in favor of someone who could show some harm that flowed from the conduct. All the rules and standards that we've developed over the centuries of tort law would disappear. I don't believe this is the tort of outrage. Even if it were the tort of outrage, even if the tort of outrage -- if a genuine issue of material fact has been demonstrated, which I don't believe it is, I believe that the statute of limitations would prevent its being advanced at this point. It's too late to file a claim

for outrage. Nevertheless, because some of the contours of the relief from that doctrine might be arguable where the same parties and substantially the same underlying dispute, although different events in the course of that dispute are at issue. Because of the applicability of relief from that doctrine is a bit difficult in that area I do want to make it clear that the reasons for my ruling are -- are in the alternative. I --I don't believe, after a careful reading of -- of all the exhibits that have been filed with the motion papaers that the tort of outrage is made out here even with a reading most favorable to Aiello.

The third cause of action for punitive damages depends on the first two and cannot stand independently, so it must be dismissed as well.

I believe that these rulings are dispositive of the entire case. Is that correct, counsel ?

MR. PAGE: I believe so, Your Honor.

THE COURT: Mr. Aiello ?

MR. AIELLO: Yes, Your Honor. I would imagine they would be.

THE COURT: Anything further before we recess ?

MR. PAGE: Nothing, Your Honor.

MR. AIELLO: Will Your Honor be sending a written copy of his decision ?

THE COURT: Well, I recite my reasons into the record like this just to avoid delaying the litigants for months while they wait for a careful written decision.

MR. AIELLO: Okay, thank you, Your Honor. I just --

THE COURT: So all that I'm going to prepare now is an order alluding to the remarks made in open court. Anything further?

MR. AIELLO: Nothing further.

MR. PAGE: Nothing, Your Honor.

THE COURT: Court will recess.

THE CLERK: Court now stands in recess.

(Recess at 3:03 p.m.)

(2)

No. 87-1408

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

FRANK V. AIELLO,

Petitioner,

v.

CALVIN MARTIN and STANLEY LEWIS,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

ARDEN E. PAGE
PETER J. MAASSEN
Burr, Pease & Kurtz
810 N Street
Anchorage, AK 99501

Counsel for Respondent
Lewis

DONALD W. McCLINTOCK
Baily & Mason
1120 West Sixth Avenue
Suite 100
Anchorage, AK 99501

Counsel for Respondent
Martin

No. 87-1408

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

FRANK V. AIELLO,

Petitioner,

v.

CALVIN MARTIN and STANLEY LEWIS,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

ARDEN E. PAGE
PETER J. MAASSEN
Burr, Pease & Kurtz
810 N Street
Anchorage, AK 99501

Counsel for Respondent
Lewis

DONALD W. McCLINTOCK
Baily & Mason
1120 West Sixth Avenue
Suite 100
Anchorage, AK 99501

Counsel for Respondent
Martin

QUESTION PRESENTED

Under Alaska law, statements made in a judicial context are absolutely privileged and cannot form the basis for a tort action against the speaker. Is there any reason for this Court to disturb two lower federal courts' decisions which properly applied Alaskan state-law privileges to bar an Alaskan state-law tort claim?

LIST OF PARTIES

Frank V. Aiello, Petitioner

Calvin Martin, Respondent

Stanley T. Lewis, Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Constitutional Provisions

Miscellaneous Textbooks, Treatises, Publications

CASES

OPINIONS BELOW

The United States District Court for the District of Alaska, Judge Andrew J. Kleinfeld, granted Respondents' motions for summary judgment on February 4, 1987, after extensive remarks on the record. The Court of Appeals for the Ninth Circuit affirmed Judge Kleinfeld's decision in a written Memorandum Opinion dated November 23, 1987. Neither opinion below was reported. Both are included in the appendix to this Opposition.

JURISDICTION

The Court of Appeals filed its Memorandum Opinion on November 23, 1987, and amended it on January 6, 1988. Petitioner Aiello filed his Petition for Writ of Certiorari on February 20, 1988, invoking this Court's jurisdiction under 28 U.S.C. § 2102(c).

STATUTES INVOLVED

This case was decided on principles of Alaskan common law, and no statutes, either state or federal, are involved.

SUMMARY OF ARGUMENT

Petitioner Frank V. Aiello concedes that Alaska law provides absolute privileges from tort liability for participants in judicial proceedings. However, he wishes to base his common-law tort claims on clearly privileged conduct. He therefore argues that a federal court should disregard settled state law and graft a "recklessness" exception onto the state-law privileges.

No constitutional issues are presented here; no federal statutes or parties are involved; no conflict among federal circuits is alleged; Aiello concedes that the Courts below decided his case in full accordance with Alaska law which, in turn, is consistent with the law of virtually every other American jurisdiction. There is no public interest, either state or federal, in disturbing a well-established system of tort

privileges specifically designed to encourage vigorous advocacy and candid testimony. In short, there is no interest whatever at stake in Aiello's Petition except his own and no reason for this Court to review the judgments of the two Courts below.

STATEMENT OF THE CASE[1]

In June 1982 an Alaska limited entry permit, which allowed the holder to commercially fish in designated Alaskan waters, was transferred to Paul Roller. The permit had been issued in the name of Danny Martin but was in the possession of Respondent Calvin Martin, Danny's father. CR 128, exh. A. Roller later claimed that Calvin Martin had intended the transfer to be a gift, CR 134, exh. C, pp. 3-5; Martin on the other hand, claimed that the transaction had been a sale and that he was entitled to either $100,000 from Roller at the end of the 1982 summer fishing season or the return of the permit. CR 128, exh. B.

In late July or early August 1982, Martin retained Respondent Stanley Lewis, an Anchorage attorney, to represent his interest in his contract with Roller. CR 134, exh. B, pp. 2-3. On August 10, 1982, on Martin's behalf, Lewis called the Alaska Commercial Fisheries Entry Commission (CFEC), the state agency with authority to regulate permit transfers. CR 128, exh. D; CR 135, exh. D, pp. 10-14. During the course of this telephone call, Lewis gave a CFEC employee certain details of the Martin-Roller transfer while seeking general information about permit transfers. Aiello contends that Lewis also urged the CFEC to do what it could to halt any attempted transfer of the permit from Roller to an "unnamed transferee." Pet., pp. 7-8.[2] Lewis' telephone call is one of the three events on which Aiello based his tort claims in the District Court. CR 143, exh. 1, pp. 35-41.

Two weeks after his call to the CFEC, Lewis filed suit against Roller on Martin's

behalf in Alaska's superior court, seeking damages and the return of the permit or its value. The complaint alleged the same details of the Martin-Roller transaction as Lewis had earlier described to the CFEC. Pet., pp. 7, 11; CR 138, exh. B.[3]

Also in August 1982, Roller allegedly agreed to sell the disputed permit to Petitioner Aiello, an acquaintance of his and a fellow California attorney. CR 134, exh. C, p. 8; exh. A, pp. 2-3. Aiello had never visited Alaska, nor had he ever had any experience in commercial fishing. See CR 161. The sale, for $63,492, was to be secured by a deed of trust on all of Aiello's California property. CR 134, exh. A, pp. 13-18.

The CFEC, however, refused Roller's request for a transfer of the permit to Aiello, informing him on October 14, 1982, that official proceedings had begun against the permit pursuant to Alaska Statute 16.43.355 (since renumbered as 16.43.970), which in part provides for the imposition of

penalties for false statements made in the course of permit transfers. CR 128, exh. E. In December 1982 Aiello sued Martin and Lewis in California state court, alleging that Lewis' call to the CFEC, two weeks before Martin v. Roller was filed, had, by alleging that Martin had a claim to the permit and thus alerting the CFEC to the permit's clouded status, interfered with his contract to purchase the permit from Roller. See CR 41.[4]

The CFEC convened a hearing on the Martin-Roller transfer in February 1983. One issue at the hearing was the identity of the person who had checked a box on the official transfer form designating the Martin-Roller transfer as a "gift." In response to questioning by the hearing examiner, Martin testified that he did not recall whether it had been he. CR 128, exh. G, pp. 12-14. A document examiner later testified that the same ink had been used on the front of the form, which Martin conceded having filled out himself, and the checked

"gift" box. CR 128, exh. G, pp. 4-7. Answering a request for admissions in Martin v Roller a few months later, Martin conceded that the box must have been checked by either him or his son Danny. CR 129, exh. G. This sequence, beginning with Martin's lack of recall at the CFEC hearing and ending with his admission that the box must have been checked by him or Danny after all, formed the second basis for Petitioner Aiello's two tort claims in the court below; Aiello claimed that the difference between the testimony and the later admission constituted an intentional "outrage" on the part of Martin and Lewis, by which he, the third-party buyer, had been damaged. CR 134, exh. A, pp. 11-12; CR 50.

In October 1986, Respondents Martin and Lewis moved for summary judgment on Aiello's two tort claims in the District Court, raising the bars of absolute privileges accorded attorneys, parties, and witnesses in preparation for and in the course of judicial proceedings. On that basis, and on

several alternative bases as well, District Judge Andrew J. Kleinfeld granted defendants' motions after hearing oral arguments on February 4, 1987. On November 23, 1987, the Court of Appeals affirmed the District Court's ruling in all respects.

REASONS FOR DENYING THE WRIT

A. Aiello's Claims Were Rightly Decided Under Alaska Law

1. Under Alaska Law, Respondents' Statements Were Absolutely Privileged

Aiello's two tort claims -- for intentional interference with prospective economic advantage and for outrage -- are based upon three separate "statements" by the respondents: (1) Lewis' telephone call to the CFEC on Martin's behalf; (2) Martin's testimony at the CFEC hearing; and (3) Martin's response to a request for admission in Martin v. Roller. Both torts are barred as a matter of Alaska law because all three "statements" on which they are based are absolutely privileged.[5]

Alaska applies the absolute privileges of the Restatement (Second) Torts (1977), which protect any statement of an attorney, party, or witness made during the course of a judicial proceeding as long as the statement "has some relation to the proceeding." See Restatement (Second) § 586 (Attorneys at Law), § 587 (Parties to Judicial Proceedings), and § 588 (Witnesses to Judicial Proceedings); McCutcheon v. State, 746 P.2d 461 (Alaska 1987) (absolute privilege for affidavits released to press over assistant attorney general's signature); Nizinski v. Currington, 517 P.2d 754, 756 (Alaska 1974) (absolute privilege for affidavit submitted by witness; corresponding privileges for attorneys, parties, and judicial officers recognized, at n. 7); Zamarello v. Yale, 514 P.2d 228, 231-32 (Alaska 1973) (absolute privilege for party's publication of lis pendens).

These three absolute privileges -- for attorneys, witnesses, and parties -- apply not only to defamation actions, but also to

any other tort causes of action that are based on statements made in a judicial context, including Aiello's claims for intentional interference with prospective economic advantage and outrage. Aiello concedes this in his Petition. Pet., pp. 28-29.[6]

Lewis' telephone call to the CFEC in August 1982 was privileged because it had "some relation to a proceeding that [was] contemplated in good faith and under serious consideration," Restatement § 586, comment d, as is conclusively proven by Lewis' filing of Martin v. Roller two weeks later reasserting the same claim. Section 586 "obviously covers communications made during investigation of a claim." Selby v. Burgess, 712 S.W.2d 898, 900 (Ark. 1986).

Furthermore, even assuming, as Aiello contends, that Lewis' call was intended to prompt the CFEC to investigate and possibly revoke Martin's permit before Aiello could enjoy its use, the call is still absolutely privileged: . "[A]ny communication with an

official agency designed to prompt investigation by that agency is absolutely privileged." Lebbos v. State Bar of California, 211 Cal.Rptr. 847, 853 (Cal.App. 1985). "A communication designed to prompt action [by an administrative agency] is as much a part of the 'official proceeding' as a communication made after the proceedings have commenced." Long v. Pinto, 179 Cal.Rptr. 182, 184 (Cal.App. 1981).

Martin's testimony before the CFEC enjoyed the absolute testimonial privilege of Restatement § 588. Nizinski, 517 P.2d at 756. His response to requests to admit in Martin v. Roller enjoyed the party's absolute privilege of Restatement § 587. Zamarello, 514 P.2d at 231.

Both the District Court and the Court of Appeals decided this case under Alaska's common law, on the basis of these absolute privileges. Judge Kleinfeld noted in his oral remarks "that both Martin and Lewis had numerous multiple privileges, any one of which would be sufficient to prevent the

action from going forward" (RT 32) and discussed in detail the witness' absolute testimonial privilege, the lawyer's absolute privilege to act and speak on behalf of his client in a judicial context, and the absolute privilege of both of them to communicate with the state agency charged with enforcement of the CFEC regulations. RT 33-34. The Court of Appeals agreed with Judge Kleinfeld's conclusion, holding: "In sum the clear and strong policies underlying the defamation privileges compel the conclusion that Martin's testimony before the CFEC, his responses to requests for admissions in Martin v. Roller, and Lewis' telephone call to the CFEC prior to filing suit on behalf of Martin, cannot be the basis for liability in tort." Memorandum, p. 4. Petitioner Aiello concedes that Alaska's law "provides a rationale for the decision of the Court of Appeals." Pet., p. 52.

2. Absolute Privileges Apply Regardless of the Merits of Martin's Contract Claim Against Roller

Seeking to undermine Alaska's privileges, Petitioner Aiello emphasizes the importance of an attorney's ethical obligation not to advance a fraudulent position. Pet., pp. 32-40. Respondents Martin and Lewis do not belittle the role of legal ethics in state-court litigation. In Aiello's blur of truisms regarding fraud and ethics, however, it is important to keep in mind the precise "fraud" Aiello alleges in this case: Lewis' advancement of his client Martin's interest in the fishing permit. Aiello's "fraud" argument is misplaced for at least four reasons.

First, whether Martin's interest in the fishing permit was consonant with state statutes is irrelevant under Alaska law. Aiello argues that the common-law privileges should apply only to those "participants [in the judicial process who are] authorized by law;" that is, if a litigant's claim to judicial process is eventually found to be

without sound legal basis, the litigant is not a "participant authorized by law," and neither lawyer nor client can claim the privilege. Thus, he argues, if the claim Lewis asserted to the CFEC was legally unsound, then nothing Lewis said to the CFEC (and, apparently, nothing to which Martin testified as a witness at the CFEC hearing or as a party to Martin v. Roller) can be privileged.

However, the "participants authorized by law" language which Aiello finds helpful to his Petition is irrelevant here; it is part of California's statutory privilege, not Alaska's common-law privilege.[7] Alaska follows the Restatement and requires only participation in a judicial proceeding and "pertinen[cy] to the matter under inquiry." Nizinski, 517 P.2d at 756. Pertinency is a question of law for the court's decision. Nizinski, 517 P.2d at 756. "The privilege embraces anything that may possibly be pertinent, and all doubt should be resolved in favor of its relevancy or pertinency."

Lee v. Nash, 671 P.2d 703, 706 (Ore.App. 1983). Lewis' call to the CFEC, Martin's box-checking testimony before the CFEC, and Martin's response to requests to admit in Martin v. Roller were clearly "pertinent to the matter under inquiry," as the District court properly found, regardless of the legal merit of Martin's claim to the permit.

Petitioner Aiello attempts to find Alaskan support for his argument by quoting Schneider v. Pay 'n Save Corp., 723 P.2d 619, 624 (Alaska 1986), which held that certain statements are privileged only if "made for the protection of a lawful business, professional, property, or other pecuniary interest." Pet., p. 42 (emphasis added). The Schneider case, however, involved not the absolute privileges applied in the judicial context, but the conditional privilege afforded extra-judicial actions taken to further one's own business interests. An actor's motive is always relevant to the application of a conditional privilege, but never relevant to the

application of an absolute privilege. It is this distinction, misunderstood by Aiello, which makes an absolute privilege absolute.[8]

Second, Aiello misinterprets even the California statutory standard In fact, "California has adopted as an elaboration of the [statutory] privilege section 586 of the Second Restatement of Torts" and that section's explanatory comments. Financial Corp. of America v. Wilburn, 234 Cal. Rptr. 653, 657 (Cal.App. 1987). Thus, while explained somewhat differently in judicial dicta, the California privileges are fundamentally the same as Alaska's.

Aiello nonetheless concentrates on the California courts' requirement that the publication for which protection is sought have "involved litigants or other participants authorized by law," Younger v. Solomon, 113 Cal. Rptr. 113, 121 (Cal.App. 1974), arguing thence that a litigant whose claim is eventually found to be legally erroneous cannot be a "participant authorized by law." While the California

courts have apparently not examined this element in detail, it is evident that it is not designed to require investigation into the underlying merit of every judicial proceeding in which allegedly defamatory statements are made, but rather to preclude protection of statements made in court by persons who have no normal, judicially-related reason to be there. Even in California, "[t]he attorney is not an insurer to his client's adversary that his client will win in litigation." Tool Research & Engineering Corp. v. Henigson, 120 Cal. Rptr. 291, 297 (Cal.App. 1975). Under California law, like Alaska law, motive is irrelevant to the application of judicial privileges: "This privilege [of an attorney] is absolute in that it applies regardless of whether a statement was uttered with malice or bad faith." Financial Corp. of America, 234 Cal. Rptr. at 656. Clearly, an advocate (Lewis), a party (Martin), and a witness (Martin again) are "participants authorized by law" whose

statements in the judicial context would be privileged even under the California standards that Aiello mistakenly espouses.

Third, Aiello's argument that Martin's claim to the permit was, as a legal matter, unsound, and that Lewis' filing of Martin v. Roller therefore constituted "a reckless disregard of the rules of statutory authority," Pet., p. 35, simplifies the issues in Martin v. Roller to an absurd degree.[9] That suit was litigated in Alaska's superior court for over five years, surviving a motion for summary judgment brought by Roller on the same legal grounds that Aiello has urged upon the federal courts in his collateral suit. Martin v. Roller ended with a stipulated dismissal, each party to bear his own costs and attorney's fees.

The issue of Martin's interest in the permit remained both legally and factually complex. The Alaska Supreme Court in Brown v. Baker, 688 P.2d 943, at 947-48 (Alaska 1984), while holding that the "promise" in

that case to return a fishing permit was an impermissible security interest, further explained that "it is not the case that all unlawful agreements are ipso facto void. If the denial of relief is disproportionately inequitable the right to recover will not be denied," quoting Jackson Purchase, Etc. v. Local Union 816, 646 F.2d 264, 267 (6th Cir. 1981). Martin, through his attorney Lewis, argued successfully in Martin v. Roller that factual issues precluded summary judgment against him on his claim to equitable relief on his contract with Roller. Even assuming that Martin's interest in the permit was "legally unsound" under Alaska's statutes, as Aiello insists, trial could still have established Martin's right to a money judgment for breach of contract.

Aiello himself, in his brief before the Court of Appeals, conceded the depth of the factual controversy surrounding the Martin-Roller sale:

> Certainly, the question of whether appellee Martin, who did not own the permit transferred by his son to Roller

> by "gift" according to requisite transfer documents admittedly filled in by appellee or his son, "sold" a permit to Roller for $100,000 is a question of fact still undetermined after five years of litigation.

Brief, p. 32. It was clearly unreasonable for Aiello to expect the District Court in his collateral lawsuit to determine the "question of fact still undetermined after five years of litigation" in Martin v. Roller before it could rule on the applicability of Alaska's absolute privileges.

Fourth, Aiello's argument that only prevailing litigants are entitled to assert judicial privileges would, if accepted, impose tremendous burdens on the courts. The first burden would be an increase in the court's responsibilities in any case in which judicial privileges are raised. Before determining the applicability of the privilege, the court would have to determine whether the defendant's position in the collateral suit was legally correct, just as Aiello sought to have the District Court

below determine the merits of Martin's claim against Roller.

The second burden would be an increase in lawsuits generally. To accept Aiello's premise -- that a litigant is not "authorized by law" and therefore loses any judicial privileges whenever his case is found to have been legally unsound -- would be to prompt a never-ending spiral of litigation, each new case feeding on the carcasses of its forebears. Anyone adversely affected by litigation to which he was not a party could sue the loser for having asserted a claim that was eventually proven unfounded and having thereby interrupted his business or caused him emotional distress. The social goals which prompted the creation of absolute privileges in the judicial context would clearly not be served by such a result.

B. Alaska's State Law of Privilege Affects No Federal Interest

Virtually every American jurisdiction,

like Alaska, applies absolute privileges to statements made in the course of a judicial proceeding.[10] Yet Aiello would have this Court hold, apparently as a matter of over-arching federal common law in derogation of the Erie doctrine, that these state-law privileges must give way before state-law tort claims of the sort he alleges.

This Court has itself recognized the legitimacy of absolute common-law privileges in the judicial context. In Forrester v. White, 56 U.S.L.W. 4067, 108 S.Ct. 538, 543, 98 L.Ed.2d 555 (1988), for example, the Court recently noted, "The common law's rationale for these decisions [applying absolute privileges] -- freeing the judicial process of harassment or intimidation -- has been thought to require absolute immunity even for advocates and witnesses." See also Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 49, 91 S.Ct. 1811, 1822-23, 29 L.Ed.2d 296 (1971), noting that "the libel laws of most of the States" subordinate an individual's

interests in libel recovery to the absolute privileges accorded to "judges, attorneys at law in connection with a judicial proceeding, parties and witnesses to judicial proceedings, congressmen and state legislators, and high national and state executive officials," and that such persons are protected "even if they publish defamatory material from an improper motive, with actual malice, and with knowledge of its falsity."

In Briscoe v. LaHue, 460 U.S. 322, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983), this Court presented its most through review of the common-law judicial privileges, holding that they had not been abrogated by the civil-rights recovery authorized by 42 U.S.C. § 1983. The Court found that "[a] rule of absolute witness immunity has been adopted by the majority of Courts of Appeals," 460 U.S. at 328 n.4, 103 S.Ct. at 1112 n.4; that similar privileges were "well established in English common law," 460 U.S. at 330-31, 103 S.Ct. at 1113; and that such

immunities served "the dictates of public policy, which requires that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible," 460 U.S. 332-33, 103 S.Ct. 1114, quoting Calkins v. Sumner, 13 Wis. 193, 197 (1860). "In short," the Court explained, "the common law provided absolute immunity from subsequent damages liability for all persons -- governmental or otherwise -- who were integral parts of the judicial process." 460 U.S. at 335, 103 S.Ct. at 1115-16.

Thus, the Alaska rules of law on which both the District Court and the Court of Appeals based their decisions in this case are fully consonant with general legal principles embraced by this Court. In Briscoe, this Court refused to subordinate the common law privileges to a plaintiff's interest in a statutory recovery under 42 U.S.C. § 1983. There is even less reason for the Court to subordinate the privileges to Aiello's interest in the common-law tort causes of action he asserted below.

Evidence below that any tort had in fact been committed was nonexistent. Although alleging intentional torts, Aiello conceded in his deposition testimony that neither Lewis nor Martin had any animosity toward him personally, or "any motive or desire or intent to injure [his] financial interests." CR 134, exh. A, pp. 6-8. While deciding the case on grounds of absolute privilege, the District Court noted that Aiello had not presented even a prima facie case of tortious interference under Alaska law. RT 31. The Court also held that the conduct of which Aiello complained was not "the slightest bit like" the conduct required for a prima facie case of outrage. RT 35-36.[11]

Aiello's argument that Lewis, by advancing a legal position which Aiello claims to find questionable, violated Alaska's canons of legal ethics gives his tort claims no added support: "Every court that has examined this question has concluded that the Code of Professional

Responsibility does not, per se, give rise to a third party cause of action for damages." Mozzochi v. Beck, 529 A.2d 171, 176 (Conn. 1987); Sullivan v. Birmingham, 416 N.E.2d 528, 534 (Mass.App. 1981). For this Court to review long-established judicial privileges for the benefit of a tort plaintiff who is unable to present even a prima facie case in tort would be nothing more than a waste of the Court's resources.

C. This Court's Decision in Nix v. Whiteside Has Nothing To Do With State-Law Tort Privileges

Petitioner Aiello asks this Court to hold that the usual common-law privileges do not apply to the tort causes of action he alleges against Lewis because this Court's decision in Nix v Whiteside necessarily abrogated common-law privileges whenever they could be used to protect an attorney's breach of his ethical obligations. Pet., p. i. However, Nix v Whiteside has nothing to do with the issue presented here.[12] The

decision discussed the circumstances under which a lawyer's conduct falls short of the minimum of professionalism required by the Sixth Amendment's right to counsel in criminal proceedings; it did not purport to address the question of when a lawyer's conduct falls short of standards of care established by state tort law, much less whether such conduct, if tortious, should abrogate state-law privileges.

The "question presented" in Nix v. Whiteside, according to Chief Justice Burger, author of the Court's opinion, was

> the definition of the range of "reasonable professional" responses to a criminal defendant client who informs counsel that he will perjure himself on the stand. We must determine whether, in this setting, [an attorney's] conduct fell within the wide range of professional responses to threatened client perjury acceptable under the Sixth Amendment.

475 U.S. at 166, 106 S.Ct. at 994 (emphasis added). Two concurring opinions emphasized that the application of Nix v. Whiteside was limited to cases in which an attorney's

conduct must be judged by constitutional standards:

> This court has no constitutional authority to establish rules of ethical conduct for lawyers practicing in the state courts. Nor does the Court enjoy any statutory grant of jurisdiction over legal ethics. . . .
>
> [T]he Court cannot tell the states or the lawyers in the states how to behave in their courts, unless and until federal rights are violated.

475 U.S. at 176, 177, 106 S.Ct. 1000 (Justice Brennan, concurring) (emphasis in original). Justice Blackmun, also concurring in the judgment, explained:

> The only federal issue in this case is whether [the attorney's] behavior deprived [his client] of the effective assistance of counsel; it is not whether [the attorney's] behavior conformed to any particular code of legal ethics. . . .
>
> It is for the States to decide how attorneys should conduct themselves in state criminal proceedings, and this Court's responsibility extends only to ensuring that the restrictions a State enacts do not infringe a defendant's federal constitutional rights.

475 U.S. at 188, 189-90, 106 S.Ct. at 1006; see also 475 U.S. at 181 n.2, 106 S.Ct. at 1002 n.2 (Justice Blackmun, concurring),

quoting with approval the opinion of the Court below that the State supreme court "is the last word on all questions of state law, and the Code of Professional Responsibility is a species of state law."

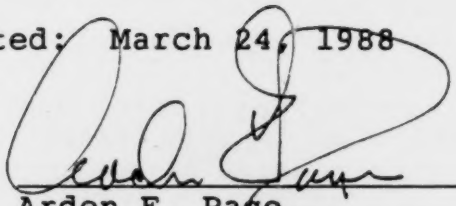
Thus, while Petitioner Aiello struggles mightily to convince this Court that Lewis' advancement of his client's claim to the limited entry permit was unethical, his argument, even if accepted, raises an issue of purely state concern. Because of "the value of preserving the [Supreme] Court's own attention and energies for the federal questions that clamor for deliberate decision[,] State law is properly left to the primary keeping of the courts of appeals and, through them, to the district courts." C. Wright, A. Miller, E. Cooper, 17 Federal Practice and Procedure (1978), § 4036, p. 31.

CONCLUSION

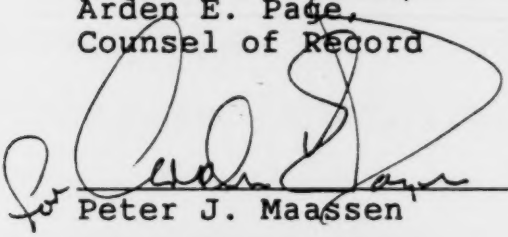
The two lower courts properly decided issues of state law which do not require this Court's attention. Respondents Martin

and Lewis therefore respectfully urge the Court to deny Aiello's Petition for Writ of Certiorari.

Dated: March 24, 1988



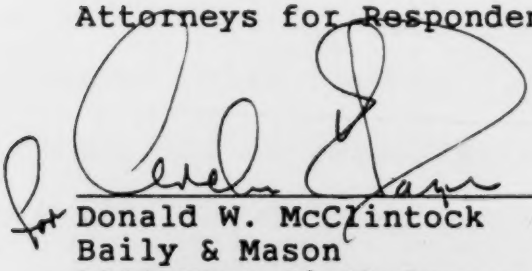
Arden E. Page,
Counsel of Record



Peter J. Maassen

Burr, Pease & Kurtz
810 N Street
Anchorage, Alaska 99501
(907) 276-6100

Attorneys for Respondent Lewis



Donald W. McClintock
Baily & Mason
1130 West Sixth Avenue, #100
Anchorage, Alaska 99501
(907) 276-4331

Attorney for Respondent Martin

FOOTNOTES

[1] Because the facts may be stated more succinctly and clearly than they are in the Petition, Respondents present this brief chronology.

[2] The exact substance of Lewis' call is disputed but is not essential to the determination of the legal issues in this case.

[3] Martin v. Roller was dismissed with prejudice in September 1987 by agreement of the parties, each party bearing his own costs and attorney's fees.

[4] Respondents subsequently removed the suit to federal district court in California pursuant to 28 U.S.C. § 1332 (diversity of citizenship), Aiello being a California citizen and Martin and Lewis being Alaska citizens. Venue was then changed from California to Alaska.

[5] Under the doctrine announced in Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), federal courts sitting in diversity cases follow State substantive law as enunciated by the State's highest court. Defamation law, unless it impinges on the First Amendment rights of the speaker, is a matter of State substantive law. Lavin v. New York News, Inc., 757 F.2d 1416, 1418-19 (3rd Cir. 1983); see Gertz v. Robert Welch, Inc., 418 U.S. 323, 345-56, 94 S.Ct. 2997, 3030, 41 L.Ed.2d 789 (1974) ("[W]e conclude that the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual").

[6] See Drummond v. Stahl, 618, P.2d 616, 619 (Ariz.App. 1980), cert. denied 450 U.S. 967, 101 S.Ct. 1484, 67 L.Ed.2d 616 (1981) (privileges bar claim for "tortious interference with a contractual

relationship"); Rosenthal v. Irell & Manella, 185 Cal.Rptr. 92, 95 (Cal.App. 1982) ("abuse of process, intentional infliction of mental distress, inducing breach of contracts, interference with prospective economic advantage, fraud, and negligence"); Sullivan v. Birmingham, 416 N.E.2d 528, 530 (Mass.App. 1981) ("libel and intentional infliction of emotional distress"); Franson v. Radich, 735 P.2d 632, 635 (Ore.App. 1987) ("intentional infliction of emotional distress").

7 Conceding the unhelpfulness of Alaska law to his position, Aiello relies heavily, throughout his Petition, upon irrelevant California caselaw, statutes, and ethical canons.

8 Aiello's invocation of the Alaska Supreme Court's discourse on attorney fraud in Mallonee v. Grow, 502 P.2d 432 (Alaska 1972) (Pet., pp. 35-36, 45-46), is also misplaced. The decision discussed conditions under which a party could be relieved from judgment because of "fraud on the court," including misconduct by an attorney in wrongfully securing a judgment for his client. Under Aiello's theory of the case, however, the "fraud on the court" at issue here occurred in Martin v. Roller, which has since been dismissed by stipulation. Granted that a court has a "duty to rectify the wrong" when a fraud has been perpetrated upon it, Mallonee, 502 P.2d at 438, the "fraud" Aiello alleges in this case occurred, allegedly, in a suit in which he was not involved, against a party other than himself. Alaska's state courts are well able to rectify wrongs perpetrated against them without the "aid" of third-party tort litigation.

9 Aiello concedes in his Petition, "If Martin had a claim of right or color of title in the permit, both he and his attorney would be privileged to prevent the

transfer of the permit to Petitioner and thus to interfere with Petitioner's business relatioship." Pet., p. 41.

10 See Walker v. Majors, 496 So.2d 726, 729-30 (Ala. 1986); Green Acres Trust v. London, 688 P.2d 617, 621-22 (Ariz. 1984); Pogue v. Cooper, 680 S.W. 2d 698, 700 (Ark. 1984); Rosenfeld, Meyer & Susman v. Cohen, 194 Cal. Rptr. 180, 200 (Cal.App. 1983); Club Valencia Homeowners' Ass'n v. Valencia Associates, 712 P.2d 1024, 1027 (Colo. App. 1985); Mozzochi v. Beck, 529 A.2d 171, 173 (Conn. 1987); Nix v. Sawyer, 466 A.2d 407, 410 (Dela. Super. 1983); Mohler v. Houston, 356 A.2d 646, 647 (D.C. App. 1976); Wright v. Yurko, 446 So.2d 1162, 1164 (Fla. App. 1984); McCarthy v. Yempuku, 678 P.2d 11, 14 (Haw. App. 1984); Richeson v. Kessler, 255 P.2d 707, 709 (Idaho 1953); Weiler v. Stern, 384 N.E.2d 762, 763 (Ill.App. 1978); Briggs v. Clinton County Bank & Trust Co., 452 N.E.2d 989, 997 (Ind.App. 1983); Asay v. Hallmark Cards, Inc., 594 F.2d 692, 697 (8th Cir. 1979) (applying Iowa law); Clear Water Trucking Co. v. M. Bruenger & Co., 519 P.2d 682, 685-86 (Kan. 1974); Massengale v. Lester, 403 S.W.2d 701, 702 (Ky.App. 1986); Sinclair v. Sullivan, 447 So.2d 36, 38 (La.App. 1984); Dineen v. Daughan, 381 A.2d 663, 644 (Me. 1978); Froess v. Bulman, 610 F.Supp. 332, 337-39 (D.R.I. 1984) (applying both Maryland and Rhode Island law); Sullivan v. Birmingham, 416 N.E.2d 528, 530 (Mass. App. 1981); Timmis v. Bennett, 89 N.W.2d 748, 752 (Mich. 1958); Matthis v. Kennedy, 67 N.W.2d 413, 419 (Minn. 1954); Houska v. Frederick, 447 S.W.2d 514, 518-19 (Mo. 1969); Cummings v. Kirby, 343 N.W.2d 747, 748 (Neb. 1984); Bull v. McCuskey, 615 P.2d 957, 961 (Nev. 1980); McGranahan v. Dahar, 408 A.2d 121, 124-25 (N.H. 1979); Piper v. Scher, 533 A.2d 974, 976-77 (N.J. Super. 1987); Penny v. Sherman, 684 P.2d 1182, 1185 (N.M. App. 1984); Weiner v. Weintraub, 239 N.E.2d 540, 540-41 (N.Y. 1968); Harris v. NCNB National Bank of North

Carolina, 355 S.E.2d 838, 841-42 (N.C. App. 1987); Theiss v. Scherer, 396 F.2d 646, 649 (6th Cir. 1968) (predicting Ohio law); Lee v. Nash, 671 P.2d 703, 705-06 (Ore.App. 1983), rev. denied 675 P.2d 491 (Ore. 1984); Triester v. 191 Tenants Ass'n, 415 A.2d 698, 701-02 (Pa. Super. 1979); Janklow v. Keller, 241 N.W.2d 364, 367-68 (S.D. 1976); Medlock v. Ferrari, 602 S.W.2d 241, 245 (Tenn. App. 1979); Russell v. Clark, 620 S.W.2d 865, 868-69 (Tex. Civ. App. 1981); Hansen v. Kohler, 550 P.2d 186, 189-90 (Utah 1976), Watt v. McKelvie, 248 S.E.2d 826, 828 (Va. 1978); McNeal v. Allen, 621 P.2d 1285, 1286-87 (Wash. 1980); Kensington Development Corp. v. Israel, 407 N.W.2d 269, 273 (Wis.App. 1987); Blake v. Rupe, 651 P.2d 1096, 1106-07 (Wyo. 1982), cert. denied 459 U.S. 1208, 103 S.Ct. 1199, 75 L.Ed.2d 442 (1983); Pacific Furniture Mfg. Co. v. Preview Furniture Corp., 626 F.Supp. 667, 679 (M.D.N.C. 1985), aff'd 800 F.2d 1111 (Fed. Cir. 1986) (apparently applying federal common law).

11 A "threshhold determination whether the severity of the emotional distress and the conduct of the offending party warrant a claim of intentional infliction of emotional distress" is properly left to the court under Alaska law. Richardson v Fairbanks North Star Borough, 705 P.2d 454, 456 (Alaska 1985).

12 Aiello's general reliance on caselaw construing the breadth of the attorney-client privilege (including this Court's decision in Nix v. Whiteside), Pet., pp. 48-50, is misplaced. Testimonial privileges and tort privileges have divergent histories and rationales which are not intended to be interchangeable. Respondents are not relying upon their attorney-client relationship to shield them from tort liability, but rather upon their individual absolute privileges as

participants in judicial proceedings. Whether a lawyer and client can conspire in secret to commit a crime, using the attorney-client privilege to shield their activities, and whether a lawyer and client can openly pursue judicial process without fear of retaliatory tort liability, are not analogous questions; society's desire for complete candor in the judicial process sometimes defeats the attorney-client privilege, while it always supports the judicial privileges.

APPENDIX

UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

FRANK V. AIELLO,	) Case No. A83-193 Civil
Plaintiff,	) Anchorage, Alaska
vs.	) Wednesday, February 4, 1987, 2:00 P.M.
CALVIN MARTIN, et al.,	) Oral Argument on Motion for Summary Judgment (Telephonic)
Defendants.	)

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE ANDREW J. KLEINFELD
UNITED STATES DISTRICT COURT JUDGE

(Beginning at p. 30 of the Transcript)

THE COURT: I'm granting the motion for summary judgment. I believe that most of the arguments by the defendants are well taken. I'm going to recite some points that particularly struck me, but these are not exclusive of other grounds upon which I'm granting the motions. It appears to me that Martin sold the permit to Roller, Roller sold the permit to Aiello for a lower price, Aiello, after -- I believe he -- as he put it in his deposition, "Looking at the law and thinking about it," decided

to take his chances on the legal status. Aiello did not get what he bargained for. He didn't get the permit and pay the $64,000.00 to Roller. However, he has not sued Roller for breach of contract. Instead he sued Martin, who did not own the permit but purported to sell his son's permit to Roller, and Martin's lawyer, Lewis. He has not sued them on a theory of subrogation standing in Roller's shoes for breach of the contract to sell the permit to Roller, nor has he sued as an asignee [sic] of whatever rights Roller might have against Martin for breach of Martin's contract to sell to Roller. It can only be inferred, considering the six files of extensive legal debate that has [sic] proceeded today's ruling that Mr. Aiello gave the most careful thought to how to proceed and decided on a tactical and strategic basis that he would be better off to proceed in tort against the parties that he did rather than in contract either against the party with -- whom he had

made the contract, or against the party who had contracted with that intermediary.

The case is preceeded [sic] on a motion for summary judgment. It's not a 1236 [12(b)(6)] motion. Parties have had plenty of time, it's quite an old case, to refine their theories, and it does appear that Mr. Aiello's theories of the case were chosen after careful strategic consideration, and that he stuck to them for strategic reasons, so there is no particular reason, I suppose, that there is any defect in his pleadings. Got the case off onto a wrong track.

On the theory of interference with contracts, the tort isn't as simple as to say that anyone who does anything that interferes with somebody elses [sic] enjoyment of economic advantages is liable in tort to the party who would have had the pleasure of performance of someone else's contract. The elements layed [sic] out in Bendix Corporation vs. Adams, 610 P.2d 24, Alaska, 1980, are number one, a valid

contract between plaintiff and another person. Presumably that would be Aiello and Roller. Two, that defendant, that would be Lewis and Martin, had knowledge of the contract, and that their intent was to induce a breach of that contract. Three that the contract was breached by the other party, that is that Roller breached the contract with Aiello. Four, that the breach was caused by defendant's wrongful or unjustified conduct. And five, that the plaintiff suffered damage as a result of the breach. It appears to me that in the face of a motion for summary judgment Aiello has not shown, by affidavits or other appropriate submissions, the existence of any one of these five elements, let alone all five. He hasn't proved the validity of the contract between himself and Roller, though perhaps that's conceded by the defendant since they haven't argued that. He certainly has not established that the defendants knew of that contract and intended to induce a

breach of the Roller/Aiello contract. The evidence tends more to show an intent to prevent Roller from getting the permit from Martin rather than to prevent Aiello from getting the permit from Roller, and so forth through the elements.

Moreover, on the issue of privilege, it does appear that both Martin and Lewis had numerous multiple privileges, any one of which would be sufficient to prevent the action from going forward.

Now, I am uncomfortable about Martin's lawyer calling a former law clerk in his firm who's now a hearing officer on the phone instead of sending a letter with a cross-carbon to Aiello, or -- or some other procedure that would give Aiello fair notice of the communications that were being made. There're some circumstances in which that kind of conduct is perfectly appropriate. For example, an ex parte report to the IRS that somebody has committed tax fraud is encouraged. The government offers a 10 percent reward.

There are other areas where that kind of contact is -- is wrongful, such as if a lawyer were to call a former partner who is now a judge, advise him of some matter in one of his files so that the judge would pull out the file and take some action on it. Anyone could recognize that a lawyer in that situation would be doing something wrong.

As for whether the -- the Fisheries Commission contact was right or wrong, I don't know. I make no finding on that. I don't think I need to make a finding on that. Even if it was wrong from the point of view of -- of a grievance proceeding, which this is not, and for which I make no suggestion or -- or finding, even if it was wrong it would not amount to an actionable tort of which Aiello could take advantage. Mr. Aiello's argument seems to assume that all he has to do is prove a wrong by someone in the process and -- and he has a cause of action, but it's not that simple. The Nizinski case -- Nizinski v.

Currington, 517 P.2d 754, Alaska, 1974, says that "Defamatory testimony by a witness in a judicial proceeding pertinent to the matter under inquiry is absolutely privileged." In that case we're talking about defamatory testimony which is harmful to somebody's reputation, and is also false. False statements under oath in testimony harmful to someone's reputation. They're absolutely privileged in Alaska, as in most places, because of the public policy of facilitating testimony in such forums.

In this case the lawyer's privileged to act on behalf of his client, the privilege of both to communicate with the agency, the privilege of Martin to testify before the agency are all applicable. The public policy is clear and strong that the agency needs to facilitate this kind of communication in order to carry out its mandate so whether there was a falsehood in the testimony, whether there was some ulterior impropriety or -- or motivation

with respect to the attorney or the client would not defeat the privilege or give rise to a tort action. Just because something may be wrong doesn't mean that the remedies are unlimited and extend to all persons. For example, in the Nizinski case, suppose the agency went to the Attorney General, presented evidence to the Attorney General that defamatory testimony had been knowingly given. The Attorney General might, in such a -- I'm now making it a hypothetical case rather than the Nizinski case, might have a perjury indictment to seek against the -- whatever witness had given knowingly false testimony. Nevertheless, the person harmed by it would not have the defamation action under the Nizinski case. That's not an unusual result. There's nothing anomalous about it. That's -- that's how privileges work.

With regard to the claim of outrage, the general statements in the -- in the books, both the Alaska case law and the restatement in Proser [sic], defining that

tort approach meaninglessness. It's not practical to try to determine from the general statements exactly what constitutes the tort of outrage. However, when one looks at the cases that have been decided under the tort of outrage one can see a pattern. There are certain kinds of conduct which have been successfully litigated, at least past summary judgments or motions for directed verdict on the theory of the tort of outrage, which is the one urged by the plaintiff. None of them are the slightest bit like the case at issue. They -- the -- some of the examples have been discussed by the parties in their briefs. Many are very extreme things such as telling a woman that her husband has just died when -- when he's alive and well, and the purpose was just to make her miserable, that type of thing. Nothing like the case at issue. The practical consequences of extending the tort of outrage to cases like the one at issue are that there would be no tort law at all.

Anytime a party could persuade a jury that somebody had acted in a fashion that the jury would like to punish, the jury could award unlimited damages in favor of anyone who could show some harm that flowed from the conduct. All the rules and standards that we've developed over the centuries of tort law would disappear. I don't believe this is the tort of outrage. Even if it were the tort of outrage, even if the tort of outrage -- if a genuine issue of material fact had been demonstrated, which I don't believe it is, I believe that the statute of limitations would prevent its being advanced at this point. It's too late to file a claim for outrage. Nevertheless, because some of the contours of the relief from that doctrine might be arguable where the same parties and substantially the same underlying dispute, although different events in the course of the dispute are at issue. Because the applicability of relief from that doctrine is a bit difficult in that area I do want

to make it clear that the reasons for my ruling are -- are in the alternative. I -- I don't believe, after a careful reading of -- of all the exhibits that have been filed with the motion papers that the tort of outrage is made out here even on the reading most favorable to Aiello.

The third cause of action for punitive damages depends on the first two and cannot stand independently, so it must be dismissed as well.

I believe that these rulings are despositive [sic] of the entire case. Is that correct, counsel?

MR. PAGE: I believe so, Your Honor.

THE COURT: Mr. Aiello:

MR. AIELLO: Yes, Your Honor. I would imagine they would be.

THE COURT: Anything further before we recess?

MR. PAGE: Nothing, Your Honor.

MR. AIELLO: Will Your Honor send a written copy of his decision?

THE COURT: Well, I recite my reasons

into the record like this just to avoid delaying the litigants for months while they wait for a careful written decision.

MR. AIELLO: Okay. Thank you, Your Honor. I just --

THE COURT: So all that I'm going to prepare now is an order alluding to the remarks made in open court. Anything further?

MR. AIELLO: Nothing further.

MR. PAGE: Nothing, Your Honor.

THE COURT: Court will recess.

THE CLERK: Court now stands in recess.

(Recess at 3:03 p.m.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Shari Stephens — March 26, 1987

Transcriber — Date

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED NOVEMBER 23, 1987
CATHY A. PATTERSON, CLERK
U.S. COURT OF APPEALS

FRANK V. AIELLO,	No. 87-3647
Plaintiff-Appellant,	D.C.No. CV-83-193
vs.	MEMORANDUM*
CALVIN MARTIN; STANLEY LEWIS,	
Defendants - Appellees.	

Appeal from the United States District Court for the District of Alaska
H. Russel Holland, District Judge, Presiding
Argued and Submitted November 5, 1987
Seattle, Washington

Before: ANDERSON, NORRIS, and HALL, Circuit Judges

Appellant Aiello, plaintiff below, appeals the district court's award of summary judgment to defendants-appellees

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Circuit Rule 36-3.

Martin and Lewis. The district court held that "both Martin and Lewis had numerous multiple privileges, any one of which would be sufficient to prevent the action from going forward." Transcript of Hearing Before the Honorable Andrew J. Kleinfeld, United States District Court Judge at 32 (hereinafter Summary Judgment Transcript). The trial court specifically relied upon the privilege protecting a witness from tort liability for his testimony, and the lawyer's privilege to communicate on behalf of her client in preparation for litigation. Id. at 33-34 (citing Nizinski v. Currington, 517 P.2d 754, 756 (Alaska 1974)). Therefore, under the trial court's reasoning, Lewis's telephone call to the Alaska Commercial Fisheries Entry Commission (CFEC) and Martin's testimony regarding who checked the box indicating that the transfer from Martin to Roller was a "gift," are both privileged statements which cannot give rise to a tort action.

Aiello does not dispute that the privileges identified in Nizinski would ordinarily protect Martin and Lewis's statements.[1] Rather, he argues that the privileges should not apply because Martin and his attorney, Lewis, were pursuing Martin's "illegal and unenforceable interest" in the fishing permit when they made their statements. See Blue Brief at 25-29. According to Aiello, Martin's alleged contract with Roller to transfer the permit to him in exchange for $100,000 or, in the event Roller was unable to pay, to return the permit (see Excerpt of Record at 46), violated Alaska law. Alaska Statute 16.43.150(b) provides that "an

---

[1] Appellees argue correctly that Nizinski supports their contention that Martin and Lewis's statements were protected by multiple privileges. See Red Brief at 8-16, 25-27. Aiello does not disagree in his brief. He appears to concede that if Martin had an enforceable interest in the permit then the defamation privileges would protect appellees' statements.

entry permit may not be: (1) pledged, mortgaged, leased, or encumbered in any way; (2) transferred with any retained right of repossession or foreclosure."[2] Aiello argues that since the Martin to Roller transfer appears to be secured by the permit in violation of Alaska law, any interest Martin now has in the permit is illegal and unenforceable.

Aiello essentially suggests that the defamation privileges are limited to suits brought to protect interests that are not "illegal and unenforceable." Aiello's reasoning would apparently require a court to assess the merits of the underlying litigation before applying the privileges.

Aiello's argument was rejected in the court below. The district court refused to limit the scope of the privileges just

---

2 An Alaska case construing this section held that a promise "to return the permit . . . is a security interest and thus, violates A.S. 16.43.150(g)." Brown v. Baker, 688 P.2d 943, 947 (Alaska 1984).

because there may have been "a wrong by someone in the process." Summary Judgment Transcript at 33. The district court said:

> In this case the lawyer's privilege to act on behalf of his client, the privilege of both to communicate with the agency, the privilege of Martin to testify before the agency are all applicable. The public policy is clear and strong that the agency needs to facilitate this kind of communication in order to carry out its mandate so whether there was a falsehood in the testimony, whether there was some ulterior impropriety or--or motivation with respect to the attorney or the client would not defeat the privilege or give rise to a tort action. Just because something may be wrong doesn't mean that the remedies are unlimited and extend to all persons.

Id. at 34. The district court, therefore, refused to limit the absolute privileges identified in Nizinski because of the "clear and strong" public policies supporting these privileges.

Aiello fails to cite any authority suggesting that the defamation privileges are abrogated as to litigants whose lawsuits are not well-founded. His reliance on cases such as Nix v. Whiteside, 106 S.Ct. 988 (1986), is completely

misplaced. See generally Red Brief at 22-25 (arguing persuasively that Aiello's authority is either inapplicable or distinguishable).[3]

In sum, the clear and strong policies underlying the defamation privileges compel the conclusion that Martin's testimony before the CFEC, his responses to requests for admissions in Martin v. Roller, and Lewis's telephone call to the CFEC prior to filing suit on behalf of Martin, cannot be the basis for liability in tort. There is no authority requiring this court to decide the merits of Martin v. Roller before deciding that the defamation privileges apply in this case.

---

[3] Appellees also argue that Aiello's interpretation of the privilege is erroneous for the further reasons that it is based on California's statutory test, not Alaska's common law test, and its premise (that Martin's lawsuit is without legal foundation) ignores the fact that Martin v. Roller has survived a summary judgment motion in Alaska superior court based upon the same legal grounds Aiello is urging here. See Red Brief at 18-19.

Aiello also argues that the district court abused its discretion by awarding $3,961.32 in attorney's fees to Lewis and Martin.[4] Aiello contends that this award represents an abuse of the trial court's discretion to award fees because he has presented evidence that Lewis and Martin acted in bad faith and in "wanton disregard of statutory authority." See Blue Brief at 45. Aiello claims that even if the defendants' conduct is held to be privileged as a matter of public policy, an award of attorney's fees is nevertheless unjustified because the defendants have not prevailed on the merits. See id. (citing Greater Los Angeles Council on Deafness v. Community Television of Southern California, 813 F.2d 217 (9th Cir. 1987)). Greater Los Angeles Council hold that

---

[4] This figure apparently represents approximately 80% of the actual fees incurred by the defendants. See Red Brief at 44.

plaintiffs who successfully sued a television station for failure to provide sufficient access to programming for handicapped persons, but whose victory was eventually reversed on appeal, could still be "prevailing parties" under the Rehabilitation Act. Id. at 219-21. This case in no way supports Aiello's contention that defendants who successfully assert a privilege as a complete defense to plaintiff's tort lawsuit are not prevailing parties.

Attorney's fees awards in diversity actions are governed by state law. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 259 n.31 (1975); Stokes v. Reeves, 245 F.2d 700, 702 (9th Cir. 1957). Rule 82 of the Alaska Rules of Civil Procedure provides for an award of attorney's fees to the prevailing party. Whether an allowance is made is left to the discretion of the trial court. Macri v. United States, 353 F.2d 804, 811 (9th Cir. 1965).

Appellees prevailed in the court below by successfully urging their litigation privileges as complete defenses to Aiello's suit. The district court therefore had discretion to award appellees fees. The record fails to support the claim that this discretion was abused.

Finally, Aiello's claim that certain motions in limine should have been decided before summary judgment was granted, see Blue Brief at 29-30, is unfounded. The goal of Aiello's motions was to obtain a judicial determination that the Martin-Roller transfer was illegal. Garrett v. City & County of San Francisco, 818 F.2d 1515 (9th Cir. 1987), upon which Aiello relies, is inapposite. The undecided discovery motions in Garrett were directly relevant to the summary judgment motion, since if the evidence sought in discovery had supported plaintiff's case, summary judgment would have been inappropriate. In the instant case, the outcome in the court below in no way

depended on a finding as to the legality of the Martin-Roller transfer. Thus, the district court did not err in granting summary judgment prior to ruling on the motions in limine.

AFFIRMED.